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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEFFAN E. CARROLL
Petitioner
v.
ARTHUR CALDERON
Warden
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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95 pp

QUESTIONS PRESENTED FOR REVIEW

1. Were the Petitioner's Fifth and Fourteenth Amendment rights to substantive and procedural due process violated by his felony conviction for spousal abuse for inflicting a "traumatic condition" upon his spouse when:

i) the only evidence of a "traumatic condition" was a report of pain from pulled hair, and:

a) the pain was reported by the victim for the first time at trial,

b) there was no objective evidence of injury, not even as much as the loss of even a single hair,

c) there was no third party corroboration, and

d) the report of pain at trial contradicted her statements to the police at the time of her arrest at which time she reported no pain or injury;

ii) state law had presumably always required an objective injury, but the trial court and every reviewing court simply ignored the plain language of the statutes and/or precedential caselaw?

2. Were the Petitioner's Fifth and Fourteenth Amendment rights to substantive and procedural due process violated by his felony conviction for forced oral copulation with his spouse, i.e., fellatio, when:

i) an essential element of the crime, i.e., non-consent to penetration, was not proved or even addressed by the prosecution, but merely non-consent to post-penetration intra-oral ejaculation was proved; and

ii) there was no showing of any coercion to compel the cooperation of the victim, cooperation that would have been physiologically required to complete the act of fellatio in contrast to the simple force that may be sufficient to complete and prove the other forms of forced oral copulation covered in the same statute, i.e., cunnilingus and anilingus?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed November 22, 1999, appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court, Northern District of California, filed February 20, 1998, appears at Appendix B to the petition and is unpublished.

The opinion of the highest state court to review the merits, the Court of Appeal of the State of California, Sixth Appellate District, filed June 14, 1993, appears at Appendix D to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Ninth Circuit decided Petitioner's case was November 22, 1999.

A timely petition for rehearing was denied by the United State Court of Appeals for the Ninth Circuit on March 3, 2000, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

All sections are from the California Penal Code, effective **January 1, 1990.** [1]

[1] All references to code sections refer to the 1990 California Penal Code unless otherwise noted. All relevant code sections are reproduced in Appendix H.

273.5 Corporal injury of spouse.

(a) Any person who willfully inflicts upon his or her spouse, ... corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for 2, 3 or 4 years, or in the county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000) or by both.

[...]

(c) As used in this section, "traumatic condition" means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force. ...

288a Oral copulation

(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person.

[...]

(c) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she, or when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat shall be punished by imprisonment in the state prison for three, six, or eight years.

[...]

(l) As used in subdivisions (c) and (d), "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death. ...

1203.065 Mandatory sentence for certain sex offenses

> (a) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person convicted of violating subdivision (2) of Section 261, ... or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, ...

Other Provisions

Additional related statutory provisions are included in Appendix H. These include the 1990 California Penal Code sections defining false imprisonment, battery, sexual battery, rape, rape of a spouse, corporal injury to spouse, bigamy, sodomy, and oral copulation. Also included are the sections defining the legislative policies regarding spousal abuse and the allocation of funds towards its prosecution.

STATEMENT OF THE CASE

Course of Proceedings and Disposition

6/16/1990: Saturday, after responding to a call from petitioner's spouse (the victim, Marilyn Carroll) the San Jose Police arrested petitioner and charged him with bigamy (§ 281), spousal abuse (§ 273.5) and false imprisonment (§§ 236/237). Petitioner was released three days later.

7/11/1990: A complaint was filed in Municipal Court, Santa Clara County, charging petitioner Steffan E. Carroll with bigamy (§ 281), and false imprisonment (§§ 236/237). (ER:29)[2] Bail was set at $20,000 but was subsequently reduced to zero and

[2] "ER" refers to the two volume Excerpts of Record filed on appeal to the US Court of Appeals for the Ninth Circuit, Dated March 3, 1999.

the petitioner was released on his own recognizance, supervised. (CT 96)[3]

1/14/1991: Preliminary examination. (CT 1–87)

1/28/1991: An information was filed charging petitioner with bigamy (§ 281), forcible sodomy of his spouse (§ 286), forcible oral copulation of his spouse (§ 288a(c)), felony false imprisonment of his spouse (§ 236/237) and felony spousal battery (§ 273.5).

4/29/1991: The court dismissed the bigamy charge because the alleged second marriage in Thailand would not have been a valid marriage in any relevant jurisdiction regardless of the existence of the prior marriage to Marilyn. (Reporter's Transcript of 4/29/91, 71)

5/9/1991: After two days of testimony and two days of jury deliberation, the jury convicted petitioner of forcible oral copulation, false imprisonment and spousal battery. The jury acquitted petitioner of forcible sodomy of his spouse. The petitioner was remanded to custody.

8/28/1991: The court denied petitioner's motions for new trial and modification of verdict. The court sentenced petitioner to the midterm six years for forcible oral copulation, a mandatory sentence (§ 1203.065), with concurrent midterm sentences of three years (spousal battery) and two years (false imprisonment).

8/17/1992: The California Court of Appeal (CCA) denied petitioner's petition for writ of habeas corpus seeking release on bail pending appeal.

6/14/1993: The CCA, Sixth Appellate District (Case # H009040), affirmed the conviction in an unpublished opinion.

7/9/1993: A timely petition for rehearing was denied.

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[3] The letters "CT" shall be employed to designate the Clerk's Transcript on Appeal in this case.

9/23/1993: The California Supreme Court denied the petition for review.

1/21/1994: The US Supreme Court denied the petition for writ of certiorari. See Carroll v. California, 510 U.S. 1192 (1994).

6/20/1994: Petitioner was released from San Quentin on parole, after serving over three years.

4/22/1996: The petition for writ of habeas corpus was filed in the United States District Court for the Northern District of California.

6/20/1997: Petitioner was discharged from custody after three years on parole.

2/20/1998: The unpublished order of the United States District Court, Northern District of California denying the Petition for writ of habeas corpus was filed.

4/3/1998: 28 U.S.C. § 2253 certificate of probable cause issued.

3/2/1999: Opening Brief for Appellant filed in the US Court of Appeals for the Ninth Circuit.

11/22/1999: The unpublished opinion of the United States Court of Appeals for the Ninth Circuit was filed.

3/3/2000: A timely petition for rehearing was denied.

The petitioner is required to register as a sex offender each year or whenever he moves, subject to prosecution as a felony for failure to do so (§ 290).

Facts of the Case

On Saturday, June 16, 1990, at about 4 p.m., the San Jose Police responded to a call from the petitioner's home made by his spouse, Marilyn Carroll. The San Jose Police arrested petitioner at his home and charged him with bigamy (§ 281), spousal abuse (§ 273.5) and false imprisonment (§§ 236/237).

June 14-16

On Thursday, June 14, 1990, Marilyn failed to return home from work as a waitress at the usual time of about 10:15 p.m. and instead arrived at around 1:00 or 2:00 a.m. Upon arrival, Marilyn explained that

she had been to a disco with Kenneth A. Hopf, whom she had met in person for the first time that evening. (ER:72:2, 214: 11–215:22)

The next night, Friday, June 15, she also went out with Hopf. Ken had unexpectedly showed up at her work place at 9 p.m. and asked her to go out that night. (ER:139:16) She called Steffan about 1:30–2:00 a.m. to tell him she was spending the night with Hopf because she was too tired to come home. (ER:73:9, 145:9, 216:4) Steffan felt hurt and angry (ER:217:22) and told her she must come home then. He told her he would pick her up, (ER:147:2–6,217:19) but she would not say where Ken lived. (ER:217:19) Steffan did not get much sleep after Marilyn called. (ER:218:4) He had twelve hours to cool down (ER: 257:2)

MidDay June 16 §§ 236,273.5

Marilyn returned home around 1:30 p.m. later that day. (ER:74:13,147:26, 151:15,217:6,257:16) By that time, Steffan only wanted an apology and recommitment. (ER:259:11) Preeya [petitioner's alleged second wife and resident of the home], Kim Hart [a roommate-tenant], and Kim's boyfriend Jen, were there. (ER:75:5,149:2,218:8) Steffan was working at his desk and Marilyn came in and stood by the desk. (ER:218:7) The other people left after about thirty minutes. (ER:149:18,161:16) After the other people left, he asked if she had slept with Ken. She said yes. (ER:151:4,218:15) Steffan did not appear angry. (ER:151:22) He told her to take off her clothes and go to the bedroom. She refused. (ER:152:4,218:19) He did not threaten her with sex acts — or anything else. (ER:152:17) He asked her if didn't she think he deserved an apology. (ER:150:13,219:10) He was still sitting at the desk and Marilyn was still standing next to it. They argued back and forth, apologize — no, apologize — no, for some time. (ER:219:17) Steffan was surprised that she did not think that an apology was in order. (ER:258:27)

At this point the versions begin to diverge. [At the time of the trial Marilyn was a citizen of the Philippines, twenty-two years old. (ER:45:15)]

Marilyn on Direct:

> Then I'm going up and then he pulled me down to the sofa and sit down. I'm going to talk to you. And I said, I'm going to do something. And then he just push on the floor and sat down and slapped me back and forth. And then I'm trying to drag with him and then finally I get up and then he drag my hair — He drag me by my hair into the downstairs, into the foot of the stairs ... about fifteen feet, I think.

(ER:75:9)

Marilyn "just shout very loud, about three times, and then he's stop hurting me." (ER:78:2)

When Steffan was holding her down she did not want to stay where he was holding her and she did not want to go where he was dragging her. (ER:75:18–24) [This was the only testimony supporting the conviction for the false imprisonment.]

It hurt when Steffan dragged her. (ER:75:27) She had no other injuries other than the hurt from the hair-hold. (ER:76:22) Marilyn further testified:

> Q. Okay. Did you have any injuries from the incident we were just talking about in June?
>
> A. I don't see any. I'm not sure.
>
> Q. Okay. How long did your head hurt after he pulled your hair?
>
> A. About three days.
>
> Q. And did anything else hurt as a result of what he did to you that day?
>
> A. Oh, my head, I just feel — hurts. [This was the only testimony supporting the conviction for spousal abuse.]

(ER:77:16)

Steffan on Direct:

Marilyn came over closer to the desk and Steffan started removing her clothes. He was still in the chair. She did not cooperate. They moved over to the center

of the living room, about eight feet away and Steffan tried harder to remove her clothes. She resisted. She started trying to bite him. He held her by her hair to keep her head away from him. He pulled her by her arm toward the stairs, about ten feet. At the stairs, she grabbed the banister and would not let go. (ER:220:3–222:21) While they were in the middle of the living room Steffan "stage slapped" Marilyn. (ER:224:3) [Marilyn did not testify that she suffered any pain or injury from these slaps. The point was never raised by the prosecution or defense.]

Steffan on Cross:

After Marilyn refused to apologize, Steffan grabbed her. (ER:262:5) He tried to remove her pants or blouse or some part of her clothing. (ER:263:24) She resisted, not with a lot of force, but sufficient to prevent him from removing her clothes. (ER:264:2) [There was no testimony that her clothing was damaged.]

It was not clear to Steffan at that time that she did not want to have her clothes taken off because that type of struggle usually happened at least once a month and it usually led into lovemaking. It took Steffan a while to determine that this was not one of those foreplay struggles — that this was in fact a genuine struggle. It was difficult for him to determine when that line was crossed. (ER:265:8–25) The communication was not made clear to him until she refused to continue on to the bedroom by wrapping herself around the banister such that he was unable to remove her. (ER:265:25–266:10)

Steffan was not clear on whether her resistance was because she did not want to be undressed in the middle of the living room floor, in the middle of Saturday afternoon and make love there, or to go upstairs and do it. It was not until she refused to go upstairs that he realized she did not want to do it at all. He did not drag her by the hair. He had a hold of her arm, she was trying to bite him, he was holding her head back by her hair to keep her from biting him. He dragged her about ten feet. She was not yelling while he

dragged her across the floor. After she wrapped herself around the banister he only tried to pull her up the stairs for a few seconds. (ER:266:11–268:26)

After the Fight

The stories converge with Steffan releasing Marilyn at the staircase.

About thirty to forty-five minutes after the struggle (ER:167:3) Steffan told Marilyn he was going to get something to eat (ER:164:18) and left the house to get boxes and to buy some Chinese food. (ER:162:21) He was gone fifteen to twenty minutes. (ER:163:16) Marilyn made no effort to call the police while Steffan was gone. (ER:164:5) After he returned he started putting Marilyn's belongings in the boxes. (ER:167:7) He then moved the boxes downstairs and left a message on Ken's machine for him to come and get her. (ER:157:21)

She went upstairs to check for missed belongings and tried to use the phone. Steffan suddenly picked up the phone, took it downstairs and told her to never touch the phone without his permission. (ER:158:11) He refused to give Marilyn his pictures of her and her letters to him. They argued about them. (ER:167:19) Steffan put the box with the pictures and letters in his car. (ER:169:1)

About 4:00 p.m. (ER:161:22) when Steffan went upstairs Marilyn went downstairs and called 911. Steffan pulled the phone cord while Marilyn was talking and then put it back. (ER:78:19,158:17) The police came and Steffan was arrested. (ER:79:6)

The responding police officer saw no bruises on Marilyn's body when he interviewed her about 4 p.m. that day. (ER:182:21–183:4) She did not claim she had any bruises. (ER:179:19)

At the time of the trial Marilyn was a conditional resident trying to become a permanent resident. (ER:81:11) June 24, 1991 was the earliest date she could apply for modification of status from conditional to unconditional permanent resident. See 8 U.S.C. § 1186a(d)(2)(A).

Fellatio § 288a

Marilyn testified that one time, in the spring of 1990 (March or April) he pushed her down on the bed, held her down, and penetrated her rectum with his penis. She tried to get up, but claimed she could not. "He's sodomized me until I'm bleeding and crying." (ER:66:28–67:18) [The jury evidently did not believe this testimony because they found Steffan not guilty of sodomy.]

She then testified: "Then after that, he turn me over and sat down on my chest and comes in my mouth." (ER:67:17) After this incident, she cried, went to the bathroom and went back to sleep. (ER:70:11)

Marilyn testified that she did not give Steffan permission to come in her mouth and that she had never previously let him do so. (ER:69:6–70:1) Neither the prosecution nor the defense ever asked Marilyn whether she objected to Steffan putting his penis in her mouth. Marilyn testified that she often fellated Steffan's penis. (ER:98:1–17) She never testified that she objected to the activity other than her objection to his intra-oral ejaculation on one occasion. Steffan testified he never forced Marilyn to fellate him but that she did so many times and that she usually initiated it. (ER:205:21–206:8,222:22,223:24) He never denied that they had engaged in an incident of intra-oral ejaculation.

REASONS FOR GRANTING THE WRIT

Standard of Review

A conviction unsupported by sufficient evidence violates due process under the Fifth and Fourteenth Amendments. *See Jackson v. Virginia*, 443 U.S. 307, 319–320, 99 S. Ct. 2781, 2789 (1979). "A federal court must consider ... whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *Jackson v. Virginia, supra* at 308.

"[I]t is reasonable that a fair warning should be given to the world in language that the common world will

understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). *See also United States v. Lanier*, 520 U. S. 259 (1997).

Felony Spousal Battery

The statute under which the petitioner was convicted, § 273.5, did not give adequate notice that his actions with his spouse might subject him to arrest, conviction and imprisonment. Up until the moment of his conviction he, and his defense attorney, believed that a felony conviction for spousal abuse required at least an injury and that an "injury" required more than a subjective report of pain in response to leading questions by the prosecution without prior foundation..

Statutory Construction Background

Section 273.5 uses the unique phrase "traumatic condition" rather than "injury" or "serious bodily injury"[4] that are used elsewhere throughout the California Penal Code as standards of injury for battery crimes.

"Battery" is any willful and unlawful use of force or violence upon the person of another (§ 242).

"'Traumatic condition' means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force" (§ 273.5d).

"'Injury' means any physical injury which requires professional medical treatment" (§ 243(f)(6)).

"'Serious bodily injury' means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of

---

[4] Great bodily injury is another standard used in other sections of the code. It is a standard used in crimes generally related to homicide, "great bodily injury means a significant or substantial physical injury" (§§ 198.5, 12022.7).

any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement" (§ 243(f)(5)).

A fair reading of the statutory scheme would seem to warn the common world that:[5]

1) When a battery is committed [evidently against one's spouse or any person] that inflicted less than a serious bodily injury, it would be punished as a misdemeanor battery by § 243, punishable by a $2,000 fine and/or no more than six months in jail.

2) When a battery is committed against a non-cohabiting former spouse that produced no objective injury of any kind, it would be punished as a misdemeanor by § 243(e), punishable by a $2,000 find and/or no more than one year in jail.

3) When a battery is committed against any person [evidently including one's spouse or former spouse] and *serious bodily injury* is inflicted on the person [or spouse], it would be punished as either a misdemeanor by § 243(d), punishable by no more than one year in jail, or as a felony punishable by imprisonment in the state prison for two, three, or four years.

4) When a battery is committed against one's spouse and a *traumatic condition* is inflicted on the spouse, it would be punished as either a misdemeanor by § 273.5, punishable by a $6,000 fine and/or no more than one year in jail, or as a felony punishable by imprisonment in the state prison for two, three, or four years.

5) If the victim is a non-cohabitating spouse who is also the parent of the perpetrator's child and less than serious bodily injury was inflicted then the perpetrator would be punished according to § 243(e), a misdemeanor, or § 273.5, a felony.

---

[5] The California Codes since 1990 and as of January 1, 2000, have been rationalized and are more consistent across these various battery crimes, though a discussion of the state of the code as of 2000 is irrelevant to this petition.

In summary:

1) A simple battery or battery with injury[6] against an ex-spouse is punished more severely than the same acts against a stranger. Presumably because the law understands that an ex-spouse has sought the protection of the state through divorce; emotions are likely to run high, and ex-spouse's are perhaps more at risk of battery than strangers.

2) A battery inflicting serious bodily injury is punished the same whether the victim is a stranger or an ex-spouse who has sought the protection of the state through divorce;

3) A battery inflicting a "traumatic condition" against a current cohabiting spouse is punished much more than a more serious "injury" battery against an ex-spouse, or even a "serious bodily injury" battery against an ex-spouse (the imprisonment is the same, but the fine is greater). So an ex-spouse who has sought the protection of the state through divorce is less protected than a spouse who remains willingly in the marriage.[7]

In short, the fair, common world understanding of what constitutes a domestic violence crime under the *McBoyle* rule is that a "traumatic condition" must mean an objective injury that is a more serious injury than the scratches, bruises, hickeys and love bites such as what might be produced by normal, ordinary, marital sexual relations and non-verbal communica-

---

[6] Injury as used here presumably includes a "traumatic conditions" but is less serious than a "serious bodily injury."

[7] The situation is really much more adverse to still married couple because in domestic violence prosecutions the complaint can be brought and prosecuted without the cooperation of the victim, whereas the victim must be the complainant in a non-spousal battery. Note that even though the law provides for rapid responses to a request for a spouse to be protected through emergency ex-parte restraining orders that can be issued in a few hours, or legal separation or divorce, the law provides no enhanced penalties for crimes against someone who has specifically requested the aid of the state.

tions, but that it would be somewhat less than the standard of "injury" which requires professional medical treatment. The common world probably expects that simple, non-injury battery within a marriage would not rise to a criminal prosecution because of the willing participation by both parties in the marriage and the easy and fast legal remedies and request of help by the state from one partner through the use of emergency ex-parte restraining orders, physical separation, legal separation, and divorce. If one spouse attempts or succeeds in preventing the other spouse from exercising legal options to request assistance from the state, then those actions are themselves punishable as crimes so the "escaping" spouse is protected.

With this background in mind, at trial, at the close of the prosecution's case, the defense made a motion for a judgment of acquittal for insufficient evidence on the felony spousal abuse count. The motion was denied. (ER:180:9-182:11) At the close of the trial the defense requested an amendment to the standard jury instruction stating that a traumatic condition must be objective or manifest and that pain without any objective evidence of injury would not be sufficient. The court declined that request. (2ER:5:28-6:9)

Caselaw

At the time of Steffan's conviction in 1991, and when the California Court of Appeal filed its Opinion in June 1993, there was no case law defining the lower limits of the threshold of "traumatic condition." New case law rectified this gap in December 1993. *People v. Abrego*, 25 Cal. Rptr. 2d 736, 21 Cal. App. 4th 133 (App. 4 Dist. 1993). The *Abrego* court held that pain or emotional upsets do not constitute an injury resulting in a traumatic condition. An objective physical injury is required.

In the federal habeas petition, petitioner argued the *Jackson* standard that if the correct jury instructions had been given as clarified by the holding in *Abrego* then there was insufficient evidence to justify a ra-

tional trier of fact to find guilt beyond a reasonable doubt.

Discussion

The rapidly growing area of domestic violence prosecutions is well funded by the federal government. Local and state governments are highly motivated to make their numbers in order to qualify for continued or increased federal funding.

Ambiguously worded statutes that have served the population well for years because of the common sense interpretation of the codes by police and prosecutors are now being exploited by police, prosecutors, and the many quasi-governmental organizations that directly profit from increased domestic violence convictions. In *Abrego* the prosecution unsuccessfully argued that a man should be convicted of felony spousal abuse and imprisoned for many years for inflicting "emotional pain" on his spouse. Under that standard anyone who has ever been married, man or woman, would be in prison.

The petitioner prays that the Court issue the writ of certiorari so that the Court may apply the important *Jackson* and *McBoyle* rules to this rapidly expanding area of criminal prosecutions.

Domestic violence cases, though they affect millions of people across the country, are usually pleaded out. If they go to trial, the sentences are completed long before the appellate process is complete and the defendants are left without resources or substantial motivation to exhaust their appellate remedies. It is for this very reason that the petitioner prays the Court's indulgence to review this case—the result will affect millions of lives.

Another important issue to be resolved is the tension between the state's interest in the preserving the "sanctity of the family"[8] and the "sanctity of communi-

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[8] *Moore v. East Cleveland*, 431 U. S. 494, 503 (1977) "[T]he Constitution protects the sanctity of the family precisely because the

(Footnote is continued on the next page.)

cations"[9] within a marriage versus the states interest in preventing violence. Does the state's interest in preventing violence—such that domestic violence can be prosecuted even over the objection of all parties when all parties are competent adults with the means to assert protection by the state through restraining orders, legal separation and divorce—supersede the privacy interests of the involved parties and the sanctity of their marriage and communications?

Forced Oral Copulation

In order to convict a defendant for forced oral copulation[10], these elements must be proved:

1) The defendant was the perpetrator.

2) The defendant penetrated the victim's mouth with his penis.

3) The victim did not consent to the penetration.

4) The non-consent was overcome by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim"

In recent decades, in order to secure a higher arrest and conviction rate for sex crimes, the threshold of evidence has been diminished (e.g., the act no longer

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institution of the family is deeply rooted in this Nation's history and tradition".

[9] *Hodgson v. Minnesota*, 497 U.S. 417, fn 33 (1990) "[T]he married couple has a well-recognized interest in protecting the sanctity of their communications from undue interference by the State. *See, e. g., Stein v. Bowman*, 13 Pet. 209, 223 (1839) ('This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence'); 2 W. Best, Principles of Law of Evidence 994-995 (1st Am. ed. 1876);"

[10] Since the petitioner was convicted of fellatio as one of several acts prohibited by the statute, only the elements to prove fellatio are discussed. Cunnilingus and Anilingus do not require penetration but only substantial contact.

must be observed by a third party), and the protections for the victim have been increased.

Over the same time, the pressure and financial incentives have increased for the police and prosecutors (and even, in some cases, the victims) to increase the number of arrests and convictions. However, the actual rate of incidence of rape and related sex crimes, as the terms were generally understood four decades ago, has remained low. The solution to this conundrum has been to expand the definitions of the crimes.

A conviction for a violation of § 288a(c) is reported as a conviction for a violent sex crime. For reporting and statistical purposes, it makes no difference whether the perpetrator was a burglar attacking a victim in her home in the dead of night, or a husband having sexual relations with his wife and when the act was not reported to anyone until months or years later, and in anticipation of a divorce to be filed by the wife.

A spousal sex crime is a prosecutorial cake-walk compared to prosecuting a stranger perpetrated sex crime. The difficult-to-prove elements of the stranger sex crime are a given, i.e., the act did occur, because it is a common and expected marital act, and the actor was the husband. The only elements left for the prosecutor to prove is non-consent and the force necessary to overcome it.

The evidentiary rules put in place to protect the victims of stranger sex crimes are applied equally to the vastly different circumstances of alleged marital sex crimes. Those rules include the notion that the victim need not resist in any substantive way, because the generally accepted knowledge is that in a stranger sex crime the victim is likely to suffer more injury. Testimony about the victim's sexual history, with others and even with the perpetrator, her husband, is usually deemed inadmissible because "the victim is not on trial."

The result is that the evidence is often simply the victim's word against the defendant. The prosecution can smear the husband-defendant with unsubstanti-

ated character assassinations but any testimony about the wife-victim's character or behavior is prohibited.

The consequences are devastating. Since sex-crime sentences are invariably served consecutively in California, and married people have sex often, a husband can easily be sent to prison for the rest of his life.

For these reasons, it is imperative that the Court addresses the standards of the *Jackson* rule as applied to sex crimes within a marriage.

No Penetration

The undisputed facts of this case are that at no time did the victim testify that she in anyway objected to her husband, the defendant, penetrating her mouth with his penis. Nor did she testify that she resisted opening her mouth to accept his penis or was in any way coerced into opening her mouth. She did testify that she objected to his ejaculating in her mouth—however, that is not an element of the crime. The opinions of the courts below simply ignore this fact. Since the conviction was upheld, then the clear implication of the decisions is that consent to penetration is abrogated by a lack of consent to intra-oral ejaculation.

No Coercion

There was no showing of any coercion to compel the cooperation of the victim, cooperation that would have been physiologically required to complete the act of fellatio in contrast to the simple force that may be sufficient to complete and prove the other forms of forced oral copulation covered in the same statute, i.e., cunnilingus and anilingus. The petitioner drew detailed distinctions in his briefs below in which he elucidated the different quality of force and threat of force required to complete the various acts of oral copulation prohibited by § 288a. These arguments were unrebutted by the state and simply ignored without comment by the courts below.

Related issues

While not central to the issues specifically proposed for granting the requested writ of certiorari, there are several related Equal Protection and Eighth Amend-

ment issues. "The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime." (§ 263) Since the essential guilt of spousal rape (§ 262) and forced oral copulation with one's spouse (§ 288a) is identical, then why is oral copulation punished much more severely?

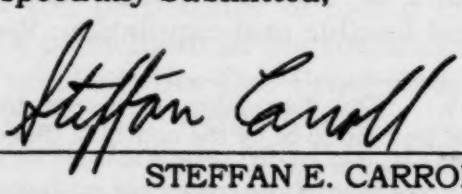
Forced oral copulation is punished with a mandatory prison sentence and life time registration as a violent sex offender, while spousal rape, limited only to vaginal intercourse can be charged as merely a misdemeanor. Both are common marital practices, but fellatio has less risk for transmission of disease and no risk of pregnancy. Where sexual services are legally available, fellatio is less expensive than vaginal intercourse. In addition, spousal rape must be reported to the police within ninety days or a prosecution is barred. Forced oral copulation by one's spouse need not be reported for as much as six years after the event.

The alleged crime in this case was not reported until six months afterwards, and only upon pro-active investigation by a sex-crimes investigator who was only on the case because of an allegation of bigamy (subsequently dismissed as unfounded) at the time of the defendant's arrest several weeks before. A sex-crimes investigator job is to find sex crimes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



STEFFAN E. CARROLL
Petitioner, Pro Se
DATED: May 30, 2000

APPENDIX A:
11/22/99 Ninth Circuit Memorandum

FILED
NOV 22 1999
CATHY A. CATTERSON, CLERK
U.S.COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEFFAN E. CARROLL, Petitioner-Appellant, v. ARTHUR CALDERON, Warden, Respondent-Appellee.	No. 98-15808 D.C. No. CV-96-3192-CAL MEMORANDUM[1]

Appeal from the United States District Court
for the Northern California
Charles A. Legge, District Judge, Presiding

Submitted November 15, 1999[2]

Before: WALLACE, FARRIS & T.G. NELSON, Circuit Judges.

Former California state prisoner Steffan E. Carroll appeals pro se the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his convictions for felony spousal battery, false imprisonment, and forcible oral copulation. We have jurisdiction pur-

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1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2 The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, Carroll's request for oral argument is denied.

suant to 28 U.S.C. § 2253. We review the denial of Carroll's petition de novo, *see Jones v. Wood*, 114 F.3d 1002, 1008 (9th Cir. 1997), and we affirm.

SUFFICIENCY OF THE EVIDENCE

Carroll contends that his due process rights were violated because his convictions were supported by insufficient evidence. These contentions lack merit.

In assessing claims asserting insufficient evidence, the "relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The court must presume that the trier of fact resolved any conflicts in the evidence in favor of the prosecution and defer to that resolution. *Id* at 326. The prosecution presented testimony establishing the elements of each of the crimes for which Carroll was convicted. First, contrary to Carroll's assertions, Ramos' testimony that her head hurt for three days after Carroll dragged her across the floor sufficiently established the element of "traumatic injury" for purposes of his conviction for felony spousal battery. *See* Cal. Penal Code § 273.5(a) & (c); *see also People v. Wilkins*, 17 Cal. App. 4th 761 (1993); *Jackson*, 443 U.S. at 319. Second, the testimony of Carroll's slapping, choking, and dragging of Ramos across the living room constituted sufficient evidence of excessive force to support a conviction for felony false imprisonment. *See* Cal. Penal Code §§ 236/237; *Jackson*, 443 U.S. at 319. Finally, there was sufficient evidence for a jury to conclude that Carroll was the perpetrator of forced oral copulation rather than a participant in the consensual exchange to which he testified. *See* Cal. Penal Code § 288a(c), *see also People v. Bergschneider*, 211 Cal.App.3d 144, 153 (1989); *Jackson*, 443 U.S. at 319. Sufficient evidence existed to support each of Carroll's convictions. *Jackson, 443* U.S. at 319.

INADMISSIBLE EVIDENCE

Carroll also contends that the trial court improperly admitted evidence that was irrelevant and prejudicial, violating his due process rights under the First Amendment and Due Process Clause. We are not persuaded.[3]

The state trial and appellate courts addressed specifically the challenged evidence. They concluded that the challenged evidence was relevant to Carroll's credibility as to the two incidences of violence at issue, to his overall veracity on the stand, and to Ramos's credibility which was attacked on the stand as to details of the incidences as well as the details of the relationship. Where evidence is relevant to an issue in the case, a federal habeas court need not explore whether a due process violation has occurred. *See Estelle v. McGuire,* 502 U.S. 62, 70 (1991). Because the challenged evidence was relevant to the prosecutions theory of the case, no due process violation occurred. *See id.*

EQUAL PROTECTION

Carroll contends that the California statute criminalizing forced oral copulation violates equal protection because it is not subject to the same 90-day reporting requirement as spousal rape, it carries a potentially longer prison sentence than spousal rape, and because it requires lifetime annual registration as a sex offender. These contentions lack merit.

Where statutory challenges made on Equal Protection grounds do not involve suspect classes or fundamental rights, the challenged legislation is presumed

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[3] On appeal Carroll argues for the first time that certain evidence should have been excluded because it appealed to the jury's anti-miscegenistic prejudices, racist stereotypes, and female juror's prejudices against men who don't do housework. Because these contentions were not raised below, we do not address them here. *See Willard v. State of California,* 812 F.2d 461, 465 (9th Cir. 1987).

to be valid if the classification drawn by the statute is rationally related to a legitimate government interest. *See United States v. Harding,* 971 F.2d 410, 412 (9th Cir. 1992). Prior to 1979, California's rape statute criminalized non-consensual sexual intercourse only between persons who were not spouses. *See* Cal. Penal Code. § 261. In 1979, the legislature added Cal. Penal Code. § 262 criminalizing non-consensual intercourse between spouses. Section 262 contained a requirement that allegations of spousal rape be reported within 90 days. In enacting such legislation the legislature could have rationally concluded that because intercourse is the conventional method of conjugal relations, absent prompt reporting by the victim, a claim of rape by a spouse may be more suspect and in need of greater verification. Because the California State Legislature's application of the 90-day reporting requirement only to spousal rape has a rational basis, Carroll's equal protection claim falls. *See Heller v. Doe,* 509 U.S. 312, 319 (1993) (holding that in determining whether a state's legislature's reasoning provides a rational basis, the wisdom, fairness, or logic of such legislative choices are not at issue).

Ineffective Assistance of Counsel

Carroll contends that his trial counsel was ineffective for failing to request an instruction regarding U.S. Immigration law and for failing to call a favorable witness.[4] These contentions lack merit.

First, the instruction that Carroll now proposes does not go to a theory of defense, it merely highlights a particular piece of evidence that Carroll believes supports his claim of innocence. *United States v. Del Muro,*

[4] On appeal Carroll also contends that his counsel was ineffective because he failed to rehabilitate Carroll's testimony after cross-examination. This contention is not properly before the court because Carroll did not raise this claim before the district court, and he has shown no extraordinary circumstances for failing to do so. *See United States v. Mejia-Mesa,* 153 F.3d 925, 931 (9th Cir. 1998).

87 F.3d 1078, 1081 (9th Cir. 1996) (holding that a defendant is entitled to an instruction on his theory of the case "provided that it is supported by the law and has some foundation in the evidence").

In any event, Carroll cannot demonstrate prejudice from the absence of such an instruction. *See Strickland v. Washington*, 466 U.S. 668, 687-90 (1984).

Defense counsel adequately explored the issue of Ramos's motivation to institute criminal proceedings on cross-examination putting the jury on notice and undermining Ramos's credibility. Further, the trial court gave the jury a credibility instruction. *United States v. Dees*, 34 F.3d 838, 842 (9th Cir. 1994) (holding that rejection of requested defense instruction is not constitutional violation if other instructions adequately cover the relevant defense theory).

Counsel was not ineffective for failing to call Cary Snyder as a witness at his trial. Defendant's trial counsel testified that he did not call Snyder as a witness because he found him to be incredible. Further, though Snyder was subpoenaed defense counsel determined that as a result of the testimony of prosecution witnesses Snyder's testimony would be damaging. Because defense counsel's decision not to call Snyder as a witness was a sound tactical decision, it was not ineffective assistance. *See Strickland*, 466 U.S. at 690-91; *see also UnitedStates v. Opplinger*, 150 F.3d 1061, 1071-72 (9th Cir. 1998) (holding that a decision not to call a witness based upon sound logic and tactics does not constitute ineffective assistance of counsel).

AFFIRMED.

APPENDIX B:
02/20/98 District Court Order

FILED
FEB 20 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEFFAN E. CARROLL, Plaintiff, v. ARTHUR CALDERON, Warden, Respondent.	No. C-96-3192-CAL **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner, a prisoner of the State of California, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In response to the court's order to show cause, respondent has filed an answer to the petition, and petitioner has filed a traverse.

I.

In 1991 petitioner was convicted by a jury of forcible oral copulation (CPC § 288a, sub. (c)), felony false imprisonment (CPC §§ 236/237), and spousal battery (CPC § 273.5, subd. (a).). The jury acquitted petitioner of a charge of forcible sodomy. Petitioner was sentenced to a 6 year term, consisting of six years for the forcible oral copulation and concurrent terms of 3 years and 2 years for the other counts.

The California Court of Appeal affirmed the conviction in an unpublished opinion.[1] In September 1993,

[1] The Court of Appeal did assign a sentencing error to the concurrent 2 year term that required it to be stayed.

the California Supreme Court denied a petition for review.

II.

Petitioner has filed this federal habeas corpus petition, alleging the following six claims:

(1) The trial court allowed the prosecutor to mischaracterize the burden of proof and subsequently judicially ratified this error;

(2) The trial court admitted irrelevant and inflammatory evidence concerning petitioner's social beliefs, attitudes and practices;

(3) The prosecutor committed misconduct by making improper arguments and conducting bad faith questioning;

(4) Petitioner's conviction for forcible oral copulation is in violation of the Equal Protection Clause of the United States Constitution;

(5) There was insufficient evidence to support petitioner's conviction on all three counts; and,

(6) Petitioner's trial counsel was ineffective because he failed to request a specific instruction and call a specific witness.

III.

This court may entertain a petition for a writ of habeas corpus "[on] behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975).

Title 28 U.S.C. § 2254(d) requires federal courts to presume the correctness of state court factual findings. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). The historical factual findings of a state court will not be set aside unless lacking fair support in the record. *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986). But federal courts reserve the right to give different legal weight to such facts, *Evans v. Lewis*, 855 F.2d 631,

633 (9th Cir. 1988), and are required to render an independent legal conclusion regarding the legality of a petitioner's incarceration, *Miller v. Fenton*, 474 U.S. 104, 115 (1985). The presumption of correctness applies to appellate as well as trial court determinations of fact, *Cabana v. Bullock*, 474 U.S. 376, 387 n.4 (1986).

Federal courts must give de novo review to legal questions and mixed questions of law and fact. *See, e.g., Thompson v. Keohane*, 116 S. Ct. 457, 464–67 and n.9 (1995). However, federal courts are bound by state court interpretations of state law. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

IV.

Petitioner's first claim for relief is that the prosecutor misstated the government's burden of proof during closing arguments, and that this error was ratified by the trial court's failure to admonish the jury as to the prosecutor's erroneous characterization.[2]

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[2] The relevant portion of the transcript is as follows (Exhibit B to Government's Answer - Reporter's Transcript, Vol I., p.531:21 to 534:12):

[DA]: The People have to prove their case beyond a reasonable doubt, and that means that to a moral certainty. Well, what's beyond a reasonable doubt? We all know that in a civil case you have to prove that something just over fifty percent in order to prevail. We also know that beyond a reasonable doubt is not a hundred percent certainty ... [s]o we just know it some where in that range and that's heck [sic] of a large range. So what are we really talking about?

[DEFENSE]: I'm going to object to that characterization as a misstatement of the law.

[COURT]: Sustained. Ladies and Gentlemen, I will read you the appropriate instructions.

[DA]: Here's how I want you to think about reasonable doubt. Here's absolute certainty up here, ok, that's not reasonable doubt. So what's the next level below that? Scientific certainty. [The DA then explains that this means scientifically testable results and analysis] ... [d]oes the jury instruction say scientific certainty? No, it doesn't. So we've gone from absolute certainty

(Footnote is continued on the next page.)

Petitioner argues that the prosecutor's characterization of the reasonable doubt standard denigrated the standard. Additionally, the prosecutor's referral to the chasm between the preponderance of the evidence standard and absolute certainty could allegedly have led the jury to believe that the reasonable doubt standard was actually lower than constitutionally acceptable.

The California Penal Code both defines reasonable doubt and provides that no further instruction other than defining the term is required. (CPC § 1096a). After closing arguments, the court gave the jury proper and full instruction on the reasonable doubt standard.

There is agreement among the federal courts that referral to the term "scientific certainty" during argument does not give rise to a constitutional error. *United States v. Whiting*, 28 F.3d 1296, 1308 (1st Cir. 1994), cert. denied, 115 S.CT. 378 (1994) (no error in reasonable doubt instruction stating, "The government is not required to establish guilt to a mathematical certainty or to a scientific certainty. The government is not required to exclude every other remote possibility."). Petitioner's traverse argues, however, that the prosecutor's remarks did not merely state that scientific certainty was not required, but that the reasonable doubt standard was lower than scientific certainty and higher than preponderance of the evidence.

As the state Court of Appeal pointed out, twice defendant's counsel objected to remarks made by the prosecutor, and twice the court either sustained the

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to scientific certainty. That's not it. What's the next level down? Moral certainty....

[DEFENSE]: Your honor, I am going to object to the interjection of scientific certainty into reasonable doubt instructions. Again I'm convinced it misstates the law.

[COURT]: Scientific certainty isn't one of the elements, but you can continue and I'll be giving you the instruction.

[DA]: Nor did I ever say it was one of the elements, your honor and counsel. Now, what beyond a reasonable doubt means has a lot to do with common sense....

objection or qualified the prosecutor's remarks. In determining that no error existed, the state court applied the analysis set out by the California Supreme Court in *People v. Clair*, 2 Cal. 4th 629 (1992). The *Clair* court noted that "the United States Supreme Court embraced the 'reasonable likelihood' standard for reviewing ambiguous instructions under the United States Constitution." *State Appellate Decision* at 21. The focus of the appellate court's inquiry then, was the difference between instructions given by a judge, and comments on the other hand by a prosecutor. Reasoning that jurors treat statement by the judge as law, and comments by the prosecutor as persuasive devices, the court found no error in the prosecutor's argument. The conclusion reached by the state appellate court that there was no prejudice to petitioner was not an erroneous application of the law.

Next, petitioner argues that the trial court failed to properly admonish the jury in response to the prosecutor's arguments. In the first objection to the prosecutor's argument about the reasonable doubt standard, petitioner cites the trial court's failure to advise the jury as to the reason why the prosecutor's statements were incorrect. As to the second objection on the interjection of scientific certainty, petitioner argues that the trial court allowed the jury to infer that the prosecutor's characterization was a correct one. The trial court responded to the objection on the interjection of "scientific certainty" by stating that "scientific certainty isn't one of the elements, but you can continue and I'll be giving you the instruction." By interjecting the negative reference to the prosecutor's argument, and then adding the qualifying term "but", the trial court indicated that the prosecutor's argument was rhetorical in nature. Further, by stating twice that the jury would be receiving the proper instructions, and in light of the defense objections, a reasonable jury would determine that the standard the prosecutor was espousing was merely rhetorical.

This was the identical reasoning used by the state Court of Appeal. Where the prosecutor made an erroneous statement, a proper objection was sustained. And where he was being rhetorical, the trial judge properly allowed the argument to continue, reminding the jury that the proper instructions would come from the court. Finally, it is clear when the jury receives full and correct instructions from the court about the burden of proof, remarks from the prosecutor about the burden do not render it constitutionally defective. *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995). Petitioner's claim for relief on these issues is DENIED.

V.

Petitioner's second claim is that the trial court improperly allowed evidence of petitioner's social beliefs and attitudes to be introduced into evidence. Petitioner contends that such admission of evidence was contrary to California Evidence Code § 352, in that the evidence was more prejudicial to petitioner than its probative value to the case.

During cross-examination of petitioner, the prosecutor questioned petitioner regarding his desire for multiple wives, as well as his fondness for Asian women. Further, the prosecution elicited testimony that petitioner was engaged in practices and beliefs consistent with a scheme to exploit Asian women.

"A federal court cannot disturb on due process grounds a state court's decision to admit ... evidence unless the admission of the evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair." *Walter v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). Where the evidence is relevant to an issue in the case, a federal habeas court need not explore further whether a due process violation has occurred. *See Estelle v. McGuire*, 502 U.S. 62, 70 (1991).

Petitioner agrees that "[o]nly if there are no permissible inferences the jury may draw from the evidence can its admission violate due process." Therefore, where there is a relevant purpose to the prosecution's

evidence surrounding the petitioner's social beliefs, sexual attitudes, and everyday practices, admission of the evidence does not constitute a violation of due process.

Petitioner first challenges the admission of evidence surrounding distasteful practices and beliefs. He argues that the admission of such evidence allowed the jury to convict him based on First Amendment rights. This court concludes that both the state trial court and appellate court were correct in finding the evidence to be probative. As discussed in the state appellate decision, credibility was important in this case. Petitioner's defense to the charges of forcible sodomy and oral copulation was that such acts were frequently consensual, or that petitioner was incapable of completing sodomy due to impotence. Evidence to refute petitioner's defense of consent was a necessary part of the prosecution's case.

The prosecution's contention was that sodomy, forced oral copulation, false imprisonment, and spousal abuse arose from a relationship built upon exploitation of Asian women in a dominant sexual relationship.[3] The evidence was relevant to the prosecution and defense arguments that there was or was not consent to the charged sexual acts. Further, the evidence demonstrated that petitioner's alleged "stage slaps", inflicted in one spousal abuse incident, were more than just for de minimis effect. The evidence was also probative to explain and controvert inconsistencies in the victim's testimony given on both on direct and cross examination.

As to petitioner's argument that admission of the evidence implicated his First Amendment rights, the state Court of Appeal determined that such prefer-

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[3] Apparently the petitioner was living with another woman named Preeya, who was from Thailand, at the same time he was married to Marilyn, the victim in this case. Testimony at trial was introduced that petitioner referred to Preeya as his wife in social circles.

ences and lifestyles do not "form a coherent set of philosophical or political beliefs such that the First Amendment would prohibit their revelation in the context of this trial." *State Appellate Decision* at 12. In reaching this decision the court referred to *Barclay v. Florida*, 463 U.S. 939 (1983), a case in which the defendant's desire to start a race war was relevant to the crimes for sentencing purposes. In this case, the evidence was relevant, as discussed above, to the issues in the case and the testimony of the witnesses, and did not violate any First Amendment rights.

As to the petitioner's claim that evidence of "marriage" issues was prejudicial and irrelevant, this court again refers to the state appellate decision. That court found that the testimony was probative for the purpose of showing petitioner's intent in seeking and bringing to this country marital partners, as well as supporting the victim's contention that petitioner had made threats of deportation. Petitioner's testimony that he believed men should dominate in such relationships was relevant to the threats of deportation and to his testimony that his use of force in the June incident was de minimis.

Finally, petitioner contests the admission of his previous statement regarding an uncharged act where petitioner handcuffed his wife using thumb cuffs, hit her several times with a riding crop, and attempted anal intercourse with her. The parties agreed prior to trial that the uncharged act would only be introduced if the petitioner "opened the door" to its admission into evidence by creating the need to impeach his testimony. As part of the admission, the riding crop and thumb cuffs were admitted into evidence, and his statement was read to the jury. Petitioner was asked on direct if there was ever an incident where he had reason to believe that his wife was not consenting to a sexual act. Upon receiving a negative answer, petitioner was asked the same question on cross-examination. When he gave the same answer, the prosecution moved to introduce the uncharged act whereby petitioner had

handcuffed his wife. In light of his previous testimony, the evidence was relevant to his credibility. Petitioner's claim for relief on these issues is DENIED.

VI.

Petitioner argues that due process was violated when the prosecutor committed misconduct by 1) appealing to passion and prejudice, 2) implying petitioner was guilty of bigamy, and 3) improperly injecting his own belief into the argument.

Where there is constitutional error through prosecutorial misconduct, the United States Supreme Court has determined that the standard of review federal courts are to apply is the harmless error rule set out in *Kotteakos v. United States*, 328 U.S. 750 (1946). *Brecht v. Abrahamsom*, 507 U.S. 619, 637–38 (1993). Thus, in order to be granted habeas relief, a petitioner must demonstrate "actual prejudice". *Johnson v. Sublett*, 63 F.3d at 930. Actual prejudice is equated with finding that the error had a substantial or injurious effect in the determination of the jury's verdict.

Petitioner alleges that the prosecutor urged the jury to convict the petitioner for improper reasons, thus appealing to passion and prejudice. In particular, the prosecutor stated that the jury should not let the petitioner get away with his continuing pattern of exploitation. In its review, the state Court of Appeal noted that defense counsel, however, failed to make a timely objection to this argument at trial.

The Court of Appeal stated that in all cases of prosecutorial misconduct, the initial question is whether there was a timely objection and if an admonition would have cured the error. Then if an admonition "would not have cured the harm, the court must rely on the record as a whole to resolve whether there was a miscarriage of justice within the meaning of the Constitution." *People v. Green*, 27 Cal. 3d 1, 34 (1990).

Petitioner argues that the failure to make a contemporaneous objection is excused as being futile, when the prosecutor's conduct had been sanctioned by the

trial court's erroneous evidentiary ruling. *People v. Pitts*, 223 Cal. App. 3d 606 (1990). This requires, however, a leap of logic that the prosecutor committed misconduct and that the trial court committed error. As discussed above, the evidence was properly admitted as relevant to the intent and motive of the parties, as well as to actions testified to by the witnesses. Thus, it was proper for the prosecutor to argue inferences that could be drown from that evidence. Additionally, both counsel argued to the jury that petitioner was not to be convinced because of his lifestyle. Because there is no error in the state appellate court's decision on this issue, its determination will not be disturbed.

Petitioner also contests the alleged bad faith questioning surrounding the petitioner's desire for multiple wives. Petitioner alleges that the questioning created the inference that he was guilty of bigamy.

Petitioner failed to make a timely objection. Nevertheless, the state appellate court addressed the underlying merits in its decision. The Court of Appeal stated, "the rule is well established that the [prosecutor] may not interrogate witnesses solely for the purpose of getting before the jury the facts inferred therein, together with insinuations and suggestions they inevitably contained, rather than for the answers which might be given." State Appellate Decision at 16, quoting *People v. Wagner*, 13 Cal. 3d 612, 619 (1975). The Court of Appeal then analyzed the record and found that the issue of multiple wives was addressed on direct by the victim, where she stated that when she arrived in America, she encountered the unusual living arrangement of sharing her husband with another woman. By applying a rule of whether curing the error would have resulted in a different outcome at trial, the court explicitly rejected petitioner's claim that harmless error be applied under *Chapman v. California*, 386 U.S. 18 (1967). Because the general rule is that all relevant evidence is admissible, the Court of Appeal's

decision that all evidence admitted was relevant would preclude a *Chapman* test for the effect of the harm.

Petitioner also argues that the prosecutor improperly injected his own beliefs into the closing arguments. Petitioner points to this comment in the prosecutor's closing argument,

> Prosecutorial ethics prevent prosecutors from individually saying what we think the facts of the case are or what we personally believe of the defendants guilt or innocence. . . [s]o you aren't going to hear me say I this, I that. It isn't because I don't have those beliefs, it is I can't express them in this context.

State Appellate Decision at 22.

It is settled law that a prosecutor commits misconduct by vouching for the government's case, or by expressing personal belief in the defendant's guilt. *United State v McKoy*, 771 F.2d 1207 (9th Cir. 1985). Further, there is no "bright-line" rule about when vouching requires reversal. *United States v. Necoechea*, 986 F.2d 1273, 1278 (9th Cir. 1993). In looking at this record as a whole, petitioner does not show that the prosecutor vouched for the government's case. Further, the prosecutor made his comments in response to defense counsel's closing argument. Where the statements are not implicit of belief in guilt, and are in response to arguments made by defense counsel, there is no prosecutorial misconduct. Petitioner's claim for relief on these issues is DENIED.

VII.

Petitioner contest application of the forcible oral copulation charge, citing the 90-day reporting statute for spousal rape. *See* California Penal Code § 262(b). That statute prohibits arrest or prosecution for spousal rape unless the violation is reported to a peace officer or district attorney within 90 days of the violation. *Id.* Petitioner contends that the differential treatment between the requirements for charging spousal

rape and forcible oral copulation is a violation of the Equal Protection Clause of the U.S. Constitution.

The Court of Appeal found that the spousal rape statute defined the violation as "an act of sexual intercourse accomplished against the will of the spouse by means of force or fear ...." California Penal Code § 262(a). The Court of Appeal then determined that based on the plain meaning of the statute, and the definition of sexual intercourse, the statute was meant to punish instances of forced vaginal intercourse against the will of the spouse. Additionally, the court noted that the spousal rape statutes were added in 1979, and were intentionally contrasted with Penal Code § 261, the general rape statute. Thus, there was no intent to place all sexual violations against a spouse under the ambit of Penal Code § 262. The distinction among these statues is no basis for a claimed violation of the Equal Protection Clause. Petitioner's claim for relief on these issues is DENIED.

VIII.

Petitioner argues that there was insufficient evidence to support the convictions.

As to the charge of forcible oral copulation, the record indicates that the victim testified that defendant pushed her down on the bed, so she couldn't get up, sodomized her, then "he turn me over and sat down on my chest and comes in my mouth .... I still struggle, but I can't move. (RT 140–141). The police officer's report also indicated that the victim said that defendant "forcibly" put his penis in her mouth. Petitioner argues that the statute defines force as force "substantially different or substantially greater than that necessary" to accomplish the act itself. *People v. Bergschneider*, 211 Cal. App. 3d 144, 153 (1989). He also argues that the fact that petitioner sat on the victim was merely positional, and that any oral copulation would require some form of cooperation on the victim's part. Under this argument, no person would be guilty of forcible oral copulation because the victim would necessarily

have to cooperate for the act to take place. The record sufficiently shows that there was force in the act and that the victim struggled to get free. Further, the fact that the victim was unable to move while the petitioner sat on her chest is more indicative of force than of a sexual position.

Petitioner argues that it was inconsistent for the jury to find that petitioner did not commit forcible sodomy, but committed forcible oral copulation in the same incident. But the trial record, discloses that the jury could have found the testimony regarding the sodomy charge to be insufficient. The jury could reasonably have determined that the sodomy did not take place, but the subsequent forced oral copulation did. The jury's finding is supported by the evidence and will not be disturbed.

As to the felony false imprisonment charge, the jury found that the incident in which the petitioner grabbed the victim, slapped her, and pulled her by the hair a distance of over 15 feet constituted a false imprisonment as defined by the statute. Under California Penal Code § 236, false imprisonment "is the unlawful violation of the personal liberty of another." Petitioner argues that the restriction of the victim from being to move freely was a result of the physical struggle itself. To support his argument, petitioner points to cases where the California Supreme Court addressed whether or not robbery and rape defendants can be charged with kidnapping because their victims are compelled to undergo movements incidental to the crime. *See People v. Daniels*, 71 Cal.2d 1119 (1969), analyzing *Cotton v. Superior Court*, 56 Cal.2d 459 (1961). In *Cotton*, the court determined that allowing a kidnapping charge where the defendant camp workers moved other workers around during a riot and assault was incongruous with the intent of the statute. The court reasoned that such logic would transform all assaults that resulted in movement of the victim into kidnapping charges.

That this case is distinguishable from the cases cited by the petitioner. The crime charged here was false imprisonment, a crime that was met by the evidence presented. Here, the victim testified that petitioner hit her, slapped her back and forth, choked her, and dragged her by the hair for 15–20 feet. Petitioner admitted to forcibly attempting to remove her clothes, slapping her and dragging her by the hair for 10 feet. Petitioner dragged the victim across the floor to the bottom of the stairs. When the victim grabbed the bannister and started screaming, he let go. During the time he was dragging the victim until she grabbed onto the bannister, the only act was the violation of her personal liberty, as opposed to an act that was incidental to the assault. The jury could reasonably infer that the elements of false imprisonment were satisfied by the evidence.

As to the spousal abuse chare, petitioner argues that there is insufficient evidence to support a finding of one of the elements of the charge, that bodily injury was done. The parties agree that in order to prove spousal battery, the prosecution must show that one spouse intentionally inflicted a bodily injury on the other, and that the bodily injury resulted in a traumatic condition. *See* CALJIC No. 9.35. A traumatic condition is defined as "condition of the body, such as a wound or external or internal injury, whether of a minor or serous nature, caused by a physical force." California Penal § 273.5(c).

Petitioner's citation of cases that construe the meaning of what constitutes a traumatic condition do not mirror the evidence at his trial. The victim testified that her head hurt for 3 days after the incident. A minor injury that is a result of the act of battery itself can indeed be labeled trivial and insubstantial. But where the victim testifies that an injury to her head caused pain for 2 to 3 days, a jury is not unreasonable in finding that a traumatic injury has occurred. Petitioner's claim for relief on these issues is DENIED.

IX.

Finally, petitioner alleges that his trial counsel rendered ineffective assistance by not requesting a specific instruction and for not calling a witness.

The rule on alleged ineffective assistance of counsel is clear. A petitioner must demonstrate: 1) that defense counsel's assistance "outside the wide range of professionally competent assistance," and, 2) that he was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 684–690 (1984).

Petitioner claims that his trail counsel was obliged to request a jury instruction informing the jury of certain relevant immigration statutes. *See* 8 U.S.C. 1186a(c)(4)(C). But such immigration statutes are not relevant to the jury's consideration of the elements of the physical sexual crimes that were charged.

The jury heard arguments by the defense, based on the cross-examination of the victim, that the charges were possibly fabricated. But petitioner's defense to the sexual charges was consent, and his defense to the false imprisonment and spousal abuse charges was that his actions did not rise to the level required to convict.

Petitioner also argues that his counsel erred when he failed to call Cary Snyder as a witness. Mr. Snyder submitted a declaration in petitioner's new trial motion stating that he would essentially have testified to the fact that he and his wife had met Marilyn a day after the alleged attack and that she told him that petitioner had not hurt her and that she was alright. Additionally, he would have testified that he did not see any bruises or markings on Marilyn. Petitioner argues that this would have rebutted Marilyn's claim that her head hurt for many days after the attack.

At the new trial motion hearing, defense counsel testified as to why he decided not to call Mr. Snyder as a witness. He stated that he was going to have Snyder's wife testify at the trial because he thought she would be an excellent witness. Further, to his knowledge, the

conversation that purportedly took place between Marilyn and the Snyders was in Tagalog, a language Mr. Snyder did not understand. When Mrs. Snyder apparently left the country to avoid testifying, defense counsel conducted reasonable efforts and diligence in determining her whereabouts. Defense counsel testified that he did subpoena Mr. Snyder in an attempt to cause Mrs. Snyder to return and testify. Defense counsel testified that at that point, Mr. Snyder claimed that he had knowledge of facts spoken to in the conversation between Marilyn and his wife. Further, defense counsel testified that at that point in the case, calling Mr. Snyder would not have fit the theory of the case the defense was presenting. Mr. Snyder's subsequent declaration must be viewed in the context of the information that he gave to trial counsel before and during the trial.

The decision not to call Mr. Snyder was consistent with the decision not to call another potential witness, one Victor Hernandez. A tactical decision not to place certain witnesses before a jury, because of credibility issues, or because such a witness may present views inconsistent with the defense's theory of the case, is not unreasonable.

In light of the strict standard set out in *Strickland*, neither of petitioner's are sufficient to warrant the issuance of a writ. Petitioner's claim for relief on these issues is DENIED.

X.

For the foregoing reasons, petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED.

IT IS SO ORDERED.

Dated: February ___, 1998.

CHARLES A. LEGGE
United States District Judge

APPENDIX C:
03/03/00 Ninth Circuit Rehearing Denied

FILED
MAR 03 2000
CATHY A. CATTERSON, CLERK
U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEFFAN E. CARROLL, Petitioner-Appellant, v. ARTHUR CALDERON, Warden, Respondent-Appellee.	No. 98-15808 DC# CV-96-3192-CAL Northern California (San Francisco) ORDER

Before: WALLACE, FARRIS and T.G. NELSON, Circuit Judges

Appellant's petition for panel rehearing is denied. There shall be no further filings in this closed appeal.

APPENDIX D:
06/14/93 Calif. Court of Appeal Opinion

FILED
JUN 14 1993
Court of Appeal - Sixth App. Dist.

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEFFAN E. CARROLL, Defendant and Appellant.	No. H009040 (Santa Clara County Super.Ct.No. 144496)

Defendant Steffan E. Carroll appeals from the judgment entered after a jury convicted him of several crimes against his wife. He claims numerous errors at trial. We affirm the judgment.

STATEMENT OF PROCEDURE

In January 1991, defendant was charged with bigamy (Pen. Code, § 281),[1] forcible sodomy (§ 286, subd. (c)), forcible oral copulation (§ 288a, subd. (c)), false imprisonment (§§ 236/237), and spousal battery (§ 273.5, subd. (a).).

Defendant's demurrer and motion to dismiss were denied, but the bigamy charge was dismissed at the beginning of trial.[2]

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The remaining counts were renumbered 1 through 4.

On May 9, 1991, a jury convicted defendant of forcible oral copulation, false imprisonment and spousal battery. He was acquitted of forcible sodomy.

On August 28, 1991, defendant's motions for new trial and modification of verdict (filed by substituted counsel) were denied. The court sentenced defendant to state prison for six years (forcible oral copulation), with concurrent terms of three years (spousal battery) and two years (false imprisonment). He now appeals.

STATEMENT OF FACTS

Viewed in accordance with the usual rules on appeal (*People* v. *Barnes* (1986) 42 Cal.3d 284, 303), the record shows: In May of 1988, defendant[3] responded to a personal advertisement placed by Marilyn Ramos, a resident of the Philippines, in "Cherry Blossoms," a magazine through which women (primarily from Asian and Pacific countries) meet men. They corresponded for the next several months, although Marilyn's knowledge of English was limited, and her letters were written or translated by "Auntie Gloria."[4] In September 1988, defendant went to the Philippines, married Marilyn and gave her family a $2,000 dowry, most of which went to Auntie Gloria. Defendant soon returned to the United States and Marilyn followed in September 1989 when her visa application was granted. During the interim, the parties corresponded and defendant sent money to Marilyn in the Philippines. Several of Marilyn's letters expressed concern for her immigration status if the authorities learned she met her husband through an advertisement, so she urged him to write letters back to her saying they had met through friends.

When Marilyn arrived in the United States, she found two other women living with defendant in his

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[3] Defendant was employed as an engineer.

[4] According to Marilyn, some things were misrepresented by Auntie Gloria; defendant challenged Marilyn's asserted lack of knowledge of English.

home: Kimberly Hart (a roommate) and Preeya Carroll, whom defendant said he had married in Thailand after he married Marilyn. Defendant did not tell Marilyn about Preeya before she arrived because he wanted her to see how she liked the situation. He referred to Preeya as his "wife," not his "spouse," which he considered only a legal designation. Marilyn and Preeya slept with defendant during alternate weeks; they divided household tasks and paid him $100.00 or more a week for "expenses." Defendant called Marilyn his "wife slave." He said his goal was to have three wives, and threatened to send her back to the Philippines if she didn't want to work.

Marilyn was upset with the situation, but did not want to return to the Philippines. Her English skills were poor and she had no friends in this country. She also knew she had to remain married for two years to obtain permanent resident status. Marilyn disliked sharing her husband with Preeya and, on one or more occasions, waved a knife at her. Apparently one time the police were called, and they sent Marilyn to spend the night in a hotel.

Defendant frequently attempted sodomy with Marilyn, but she resisted vigorously. One time, in the spring of 1990 (approximately March or April), he forcibly penetrated her anally with his penis. She testified that he pushed her down on the bed, held her down as she struggled and penetrated her rectum with his penis. Under cross-examination, she was less than certain about actual penetration.[5] Defendant then turned her over, sat on her chest so she could not get up, and put his penis in her mouth and ejaculated. She was bleeding and crying; he said "Go ahead, call the police, and let's see who's going back to the Philippines." According to Marilyn, she did not consent to the acts, but at that time did not know they were crimes.

[5] Her statement to the investigating police officer and at the preliminary hearing indicated no penetration.

In addition to her job in a restaurant, defendant encouraged Marilyn to sign up with a telephone dating service. She said he allowed her to have boyfriends if they paid money. Through this service, she met Ken Hopf and went on a date with him on June 14, 1990. The next night, she also went out with Hopf. When she called defendant to tell him she was spending the night with Hopf, he became angry and told her that he would tie her to the bed and "fuck [her] up the ass" when she came back home, or would end their relationship.

When Marilyn returned home around noon the next day, Preeya Carroll and Kim Hart were there with defendant. After the two women left, defendant demanded an apology. When she refused, they argued. He pushed her down and began to forcibly remove her clothes. He slapped her several times, then grabbed her by the hair and dragged her across the room to the stairs. Screaming, Marilyn clung to the banister, and defendant eventually abandoned his efforts to remove her. He ordered her to leave and threw her clothes in a box. Defendant left the apartment briefly. Eventually, she used the telephone to call the police.

The responding police officer saw no bruises on Marilyn's body when he interviewed her about 4 p.m. that day, but she testified her head hurt for three days. After that, she went to stay with Hopf. Her divorce from defendant became final prior to trial.

Trial

Defendant's successful pre-trial motions kept from the jury much of the evidence seized from his home, including literature and other items exhibiting defendant's interest in certain sexual practices, such as sado-masochism, other evidence of his membership in specific organizations and documents reflecting interest in male/female dominance and submission. The trial court expressed concern that defendant not be tried for his philosophy or his unusual lifestyle. The prosecutor finally conceded the evidence did not meet

the requirements of Evidence Code section 1101, subdivision (b).

In addition to Marilyn Ramos and defendant, other witnesses at trial included defendant's roommate Kimberly Hart and Police Officer McLaren, who investigated the crimes. The testimony of the responding police officer (Paulides) was introduced by stipulation.

The complaining witness Marilyn Ramos had difficulty with her English communication skills. She apparently had used an interpreter at the preliminary hearing, and frequently blamed the interpreter for inconsistent statements introduced from that proceeding. Her responses at trial were sometimes confusing or unclear, and even contradictory.

In his trial testimony, defendant essentially admitted the acts of June 16, including the fact that he told Marilyn she would have to submit to anal sex or move out, that he was angry and planned to do something physical "with" her, and that he pushed, slapped and dragged her. He insisted he pulled her hair only because she was trying to bite him and that the slaps were "stage slaps." As to the March incident, he said there was no anal penetration because of his insufficient erection, and that oral copulation was frequent and consensual. He testified that the partners' fights or struggles frequently led to love-making, so he didn't realize Marilyn was not consenting in June. He admitted he did not tell Marilyn about Preeya. He had gone through a religious ceremony with Preeya and intended to divorce Marilyn after two years. He said that he told her about the immigration laws for her own information and not to threaten her with deportation.

DISCUSSION

I. Admission of Prejudicial Evidence

Defendant first contends that his right to a fair trial was "fatally impaired" by a series of erroneous evidentiary rulings. In essence, he complains that his First Amendment rights were violated by the prosecutor's

cross-examination, which elicited testimony about his "social beliefs and practices." The People respond that this information was relevant to attack his credibility and to impeach his testimony.

Defendant relies primarily on the case of *Dawson* v. *Delaware* (1992) ___ U.S. ___ [112 S.Ct. 1093], wherein the Supreme Court concluded that the First and Fourteenth Amendments prohibited the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence had no relevance to the crime or the issues being decided in the proceeding.

Before reaching the details of defendant's argument, we must consider the basic principles applicable to the admission of evidence. First, all relevant evidence is admissible, except as otherwise provided by statute. (Evid. Code, § 351; *People* v. *Green* (1980) 27 Cal.3d 1, 19.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," including evidence relevant to the credibility of a witness. (Evid. Code, § 210.) Although some character evidence may be inadmissible when offered to prove specific conduct, relevant evidence offered to support or attack the credibility of a witness is generally admissible, subject to the provisions of Evidence Code section 352. (Evid. Code, § 1101, subd. (c); § 1100.) Moreover, "Evidence Code section 352 permits the trial court 'to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption.' [Citation.] The court's exercise of discretion in admitting or rejecting proffered evidence will not be disturbed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice. [Citations.]" (*People* v. *Milner* (1988) 45 Cal.3d 227, 239.)

Defendant challenges numerous questions asked of defendant concerning his personal preferences in marital partners, his relationship to Marilyn and

Preeya and his opinion about male-female relationships. Some of these questions were objected to, but some were not. Accordingly, in the absence of a timely and specific objection on the appropriate ground, we deem the point waived. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 22.)

We conclude the evidence now challenged was relevant to both main witnesses' credibility: defendant's credibility as to the two incidents involved as well as his overall veracity on the stand; Marilyn's credibility, which was attacked in cross-examination on both incidents and on details of the relationship. Defendant basically admitted the events of the June incident, but interpreted them as a domestic disagreement. He insisted the March incident was consensual with no anal penetration. He also maintained that he informed Marilyn about the immigration laws for her own benefit, not to threaten her. During her testimony, Marilyn was accused of immigration fraud and tarnished with her inconsistent statements about the offense and her confused, sometimes contradictory testimony. Moreover, the context of the relationship shed light on her delay in reporting the March incident.

Testimony elicited

The prosecutor questioned defendant about his behaviors, preferences and lifestyle choices. He now objects, as unduly prejudicial, to specific questions about his "marriage" to Preeya in addition to his marriage to Marilyn. Most of these questions were not objected to below. More importantly, the essential facts were testified to by Marilyn and were appropriately admitted to show the unconventional living situation.[6] Marilyn also testified to defendant's desire for several wives. Defendant now attacks the prosecutor's question, over objection, as to how many wives or living partners he wanted to end up with. But he had failed

[6] No objection was made to the question eliciting defendant's response that he intended to "terminate the civil marriage" with Marilyn after two years.

to object to a similar question a few minutes earlier concerning his desire to live with several women as his common law wives.

As to questions concerning his preference for Asian women or methods for finding partners, this information had some probative value on defendant's intent in seeking and bringing to this country marital partners, as well as to threats of deportation. The question that comes closest to implicating defendant's "beliefs" is the prosecutor's query: "Don't you believe that men ought to be the dominant ones in an relationship?"[7] But this question also has some relevance to his alleged threats of deportation as well as his explanation of his slaps and use of physical force in the June incident as de minimis.

Uncharged acts

Defendant also challenges the testimony concerning and admission into evidence of thumb cuffs and a riding crop, which he admitted using in a sexual interaction with Marilyn. This information was apparently part of a statement given by defendant to the police officer when he was arrested. The trial court initially excluded the evidence under Evidence Code section 1101, subdivision (b), after the prosecutor sought to admit it either as evidence supporting an amendment of dates concerning the false imprisonment charge or as a prior specific incident where his attempted sodomy was prevented by Marilyn's vigorous struggles. However, the court remarked that the evidence would be admissible if it later became relevant. After defendant previously testified on direct examination that he had never had anal intercourse without Marilyn's consent and that he never tried to override her objections by force, defense counsel asked: "Was there ever a time when you had any sexual conduct with Marilyn

[7] Defendant also objected to the question of whether he was seeking commitment first, love later and an earlier question about his opinions asked of another witness. This question is more fully discussed in the next section on prosecutorial misconduct.

that you did not think — did not believe that she was consenting to that conduct, whatever it was?" Defendant answered: "No." He then testified she consented to and initiated oral sex. On cross-examination, when defendant again denied non-consensual conduct, the prosecutor sought to admit the sexual devices and statement to the police officer. After a lengthy discussion of the various issues involved, the trial court ruled the items admissible.[8]

Defendant now argues that because Marilyn never testified that this incident was against her will, the items should not have been admitted to impeach his statement that he never forced her to have sexual contact. He claims this evidence was not probative of any issue, and only illustrated an unconventional sexual practice. We disagree. Although we have only the quoted excerpt of the police report before us, the trial court apparently reviewed the entire document. The reported incident does have some tendency to show previous nonconsensual sexual conduct, and thus is direct impeachment of defendant's denial and reflects on his veracity. (See *People* v. *Harris* (1989) 47 Cal.3d 1047, 1082.) Prejudice suffered from such evidence is outweighed by its probative nature.

As to defendant's assertion that the questions and evidence concerned his beliefs and practices and thus were protected by the First Amendment, we disagree. The preferences and lifestyle choices expressed by defendant do not form a coherent set of philosophical or political beliefs such that the First Amendment would prohibit their revelation in the context of this trial.

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[8] The prosecutor read from the police officer's statement: "'In March, he handcuffed the victim, Marilyn Carroll's hands, using his thumb cuffs. Forced her face down on the bed. He said he hit victim, Marilyn Campbell [sic], several times in the butt with a riding crop and then attempted anal intercourse with victim, Marilyn Carroll. . . . Suspect Carroll said victim, Marilyn Carroll, began to struggle to the point where suspect Carroll could not make penetration. Suspect Carroll said he gave up and made rear entry, vaginal intercourse with victim Marilyn Carroll.'"

(See *Barclay* v. *Florida* (1983) 463 U.S. 939 [evidence of defendant's desire to start a race war was relevant to the crimes charged for sentencing purposes].) Accordingly, we decline to review any errors under the harmless beyond a reasonable doubt standard set forth in *Chapman* v. *California* (1967) 386 U.S. 18.

To the extent the challenged information had some probative value because of the specific circumstances and crimes at issue here, any prejudice was outweighed. (See *People* v. *Clark* (1992) 3 Cal.4th 41, 123-131 [evidence of violence and deviant sexual practices not unduly prejudicial where murders alleged had sexual component]; *People* v. *Nicolaus* (1991) 54 Cal.3d 551, 577-578 [evidence of defendant's hostility toward religion admitted as relevant and probative even though prejudicial].) We find no manifest abuse of the trial court's discretion resulting in a miscarriage of justice. (Ibid.; Evid. Code, § 353.)

II. Prosecutorial Misconduct

Next, defendant makes numerous claims of prosecutorial misconduct. We consider each separately.

Closing Argument

"An argument by the prosecution that appeals to the passion or prejudice of the jury is improper. [Citations.]" (*People* v. *Pitts* (1990) 223 Cal.App.3d 606, 694; *People* v. *Haskett* (1982) 30 Cal.3d 841, 863.) However, "the initial question to be decided in all cases in which a defendant complains of prosecutorial misconduct for the first time on appeal is whether a timely objection and admonition would have cured the harm. If it would, the contention must be rejected [citation]; if it would not, the court must then and only then reach the issue whether on the whole record the harm resulted in a miscarriage of justice within the meaning of the Constitution." (*People* v. *Green*, *supra*, 27 Cal.3d at p. 34.)

Defendant insists that the prosecutor's closing argument unfairly emphasized his beliefs, attitudes, and practices, especially through the prosecutor's theme

that defendant engaged in a pattern of exploitation, both economically and sexually.[9] He also maintains that his lack of objection is excused because of the trial court's previous erroneous rulings. (*People* v. *Pitts*, *supra*, 223 Cal.App.3d at p. 693.)

We have already determined that the evidence referred to by the prosecutor was properly admitted. If defendant believed the emphasis on exploitation was unfair, he should have objected at trial and requested a curative admonition. "[I]t is well settled that the prosecutor has broad discretion to state his or her views as to what the evidence shows and what inferences may be drawn therefrom. [Citations.]" (*People* v. *Kelly* (1990) 51 Cal.3d 931, 967.) Both counsel in clos-

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[9] "[DISTRICT ATTORNEY] . . . Now, this is an unusual case with very unusual facts, but I think there's one common theme that runs throughout it, and that common theme is exploitation. . . . The defendant testified that marriage doesn't mean a whole lot to him; he wants up to seven wives. Okay. So what does he really want? He's looking for servants. He's looking for someone to be submissive to him. He's looking for someone he can control. . . . [¶] We're talking about Marilyn and Preeya now. Controls them with the threat of deportation. Both Marilyn and Preeya depended on the defendant for them to stay in this country. And with respect to Marilyn, why else would a woman who's married consent to live in a threesome with her husband? She doesn't want to go back. She feels like she's stuck. So the defendant brings her here, never tells her that he's already got another woman living with him here. . . . He's earning money from them, once they start working, so they aren't praying on his resources, they're benefiting him. And they're benefiting him in another way, as he's sleeping with them on an alternating basis, for at least the first couple of months that they are there. [¶] So we've got economic exploitation concerning their pay and their work. We've got sexual exploitation and we've got psychological exploitation. He dominants [sic] them. . . . Marilyn isn't as compliant as the defendant hoped. And she's especially not compliant in that one particular area where he has a specific interest, and that is she won't give him what he wanted in bed, sodomy. Marilyn testified the defendant tried to sodomize her on numerous occasions. Based on that in the defendant's own statement of being interested in sodomy we know he's got an interest in this area. We also know by his own admission, that when he gets angry, he gets horny."

ing argument pointed out that defendant was not to be convicted because his lifestyle was objectionable.

Bad Faith Questions

Next, defendant asserts he was prejudiced by the prosecutor's repeated bad faith questions accusing him of having multiple wives. He points first to the cross-examination of Kim Hart (his roommate), when counsel objected to the question: "And did he tell you he married Preeya before he brought her back?" After defense counsel's objection on relevance grounds and a conference at the bench with no reported ruling, the prosecutor went on to a different topic. Initially, we note that the most logical reading of the transcript at this point indicates the objection was sustained. In addition, counsel's failure to obtain a ruling on the record waives the point for appeal. (See *People* v. *Hayes* (1990) 52 Cal.3d 577, 619.) Defendant then points to several questions the prosecutor asked in cross-examining him about his desire for more than one wife — the same questions complained of above.

Only one of these questions was objected to. Defendant asserts that the initial objection he made to the question asked of Kim Hart obviated the need for further objections because of the trial court's ruling. This is clearly incorrect. As noted above the record contains no ruling on the objection and it seems to have been sustained. An objection to a similar question asked directly of defendant should have been raised when the question was first asked. (See *People* v. *Green*, *supra*, 27 Cal.3d at p. 22, fn. 8.)

After numerous questions of defendant relating to his desires for more than one wife, defense counsel objected on relevance and Evidence Code section 352 grounds, and a lengthy discussion was had on the record but outside the presence of the jury. Essentially, the trial court overruled the objections but urged the prosecutor to move on and not repeat the same questions. Defendant assigns error to two later questions: "Isn't it true that you had been trying to get additional wives the whole time that you were staying there?"

"Okay. During the whole time that Marilyn was living there with you at the Norwalk address, you were in the process of trying to solicit other wives, weren't you?" Defense counsel renewed his continuing objection to the first of these questions.

"The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' [Citations.]" (*People* v. *Wagner* (1975) 13 Cal.3d 612, 619.) Defendant insists that these questions prejudicially influenced the jury to believe he committed bigamy, when that charge had been dismissed prior to trial.[10]

Defendant might have argued more successfully that the questions were repetitious or had been asked and answered. Even were we to assume error in permitting these questions to be asked, we see no prejudice because we find no reasonable probability of a different outcome in the absence of the error. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.) Here, the general topic of more than one wife was introduced during the direct examination of Marilyn because it related to the unusual living situation she encountered when she ar-

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[10]The parties now disagree as to the reason the bigamy charge was dismissed. Defendant claims the prosecutor knew defendant was not guilty of having more than one legal marriage and thus dropped the charges. The People insist that the requisite documentary evidence of an official marriage registered in Thailand could not be obtained, and that is why the prosecutor dismissed the charges. The People also speculate that Preeya Carroll's testimony would not be available at trial. However, at the preliminary hearing she testified that she and defendant had a religious marriage in Thailand but never officially registered it and that she understood she would not legally be married to defendant until he divorced Marilyn. This dispute involves speculation, the parties' differing interpretations of "marriage" and is not directly relevant to our resolution of this issue.

rived in this country as defendant's "wife."[11] Defendant himself admitted that he did not tell Marilyn of this situation before marriage, and that he considered both women his wives. We do not see how the further, although possibly repetitive, questions about multiple wives could have prejudiced defendant such that a different verdict was reasonably probable.[12]

Jury's Responsibility to Return Guilty Verdict

After urging the jurors to evaluate the truth of defendant's statement that he told Marilyn about deportation only for her information, not to control her, the prosecutor cited the jury instruction concerning a witness testifying falsely in one part of his testimony. The prosecutor then stated: "And it also sheds light on the defendant's frame of mind and his attitude toward this trial. He's trying to continue his pattern of exploitation. First it's Marilyn, then it's Preeya, now it's the system, and ultimately it's you. He's gotten away with it so far. He's trying to pull it off one last time. Don't let him do it." We do not read this portion of the closing argument as inappropriately urging the jury to return a guilty verdict and uphold its civic responsibility. Moreover, no objection was raised, and we consider it waived. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 34.)

Mischaracterization of Burden of Proof

Defendant contends the prosecutor incorrectly defined "reasonable doubt" in his closing argument, thus undermining the reasonable doubt standard and mischaracterizing the burden of proof the state must meet. The People reply that the remarks were only a colloquial explanation of the concept of proof beyond a reasonable doubt, and that a misstatement of the law is only misconduct if done deliberately or in bad faith. (See *People* v. *Bonin* (1988) 46 Cal.3d 659, 702,)

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[11] Defense counsel's objection on the ground of relevance was overruled.

[12] We reject defendant's position that any misconduct here and in closing argument implicates the harmless beyond a reasonable doubt standard of *Chapman* v. *California*, *supra*, 386 U.S. 18.

In discussing the concept of reasonable doubt, the prosecutor remarked that the definition was an example of "convoluted legalese." He then explained that the range of certainty required varied from civil to criminal trials and noted that the instruction on reasonable doubt didn't require scientific certainty. The remarks and the defendant's objections are set forth in full in the margin.[13]

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[13] "[DISTRICT ATTORNEY] . . . What most defense arguments boil down to really is that the People haven't proved their case because we haven't proved it beyond a reasonable doubt. That requires you to judge what does the reasonable doubt instruction really mean. It's one of the most convoluted cases of legalese that most of us have probably ever seen. Unfortunately, that's the standard. So I just want you to think about this a little bit. The People have to prove their case beyond a reasonable doubt, and that means that to a moral certainty. [¶] Well, what's beyond a reasonable doubt? We all know in a civil case you have to prove something just over fifty percent in order to prevail. We also know that beyond a reasonable doubt is not a hundred percent certainty, because that's impossible, and the judge will instruct you about that. So we just know its somewhere in that range and that's a heck of a large range. So what are we really talking about? [¶] [DEFENSE COUNSEL]: I'm going to object to that characterization as a misstatement of the law. THE COURT: Sustained. [¶] Ladies and Gentlemen, I will read you the appropriate instructions. [¶] [DISTRICT ATTORNEY]: Here's how I want you to think about reasonable doubt. Here's absolute certainty up here, okay, that's not reasonable doubt. So what's the next level below that? Scientific certainty. What's scientific certainty? Well, there's certain things scientists can test, we can say within a certain percentage of error certain things are true, based on physical properties and that type of thing. Does the jury instruction say scientific certainty? No, it doesn't. So we've gone from absolute certainty to scientific certainty. That's not it. What's the next level down? Moral certainty. What's moral certainty? It has to do with every day life, day to day affairs of people. This is why I asked you during jury selection, don't leave your common sense at home. What is — [¶] [DEFENSE COUNSEL]: Your honor. I am going to object to the interjection of scientific certainty into the reasonable doubt instructions. Again I'm convinced it misstates the law. [¶] THE COURT: Scientific certainty isn't one of the elements, but you can continue and I'll be giving you the instruction."

The state has the burden of proving a defendant guilty beyond a reasonable doubt. (§ 1096.) The Penal Code defines reasonable doubt,[14] and instructs that the court may read to the jury the statutory definition "and no further instruction . . . defining reasonable doubt need be given." (§ 1096a.) Error generally arises in the context of an incorrect instruction by the trial court. (See, e.g., *People* v. *Garcia* (1975) 54 Cal.App.3d 61, 63-67; *People* v. *Rubalcava* (1988) 200 Cal.App.3d 295, 299.) Here, there is no claim that the trial court mistakenly defined reasonable doubt; only that the prosecutor incorrectly explained the concept in his closing argument.

Certainly counsel have broad discretion in closing arguments to discuss the legal and factual merits of the case; however, "it is improper to misstate the law. [Citation.]" (*People* v. *Bell* (1989) 49 Cal.3d 502, 538.) Defendant twice, objected and each time the court admonished the jury. We must assume the jury followed the trial court's instructions and admonitions. (*People* v. *Frank* (1990) 51 Cal.3d 718, 728.)

Defendant further asserts that the prosecutor's erroneous explanation implicates a federal constitutional right and thus requires our review under the *Chapman* standard of determining whether the error was harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra*, 386 U.S. 18.) However, our Supreme Court recently discussed the appropriate standard of review for prosecutorial comments, in the context of *Griffin* error and "prosecutorial remarks generally." (*People* v. *Clair* (1992) 2 Cal.4th 629, 662-663.) The Clair court

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[14] "Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'" (§ 1096.)

noted that the United States Supreme Court embraced "the 'reasonable likelihood' standard for reviewing ambiguous instructions under the United States Constitution," which involves "inquiring whether there is a reasonable likelihood that the jury misconstrued or misapplied the words in violation of that document. [Citation]" (*Clair, supra.* 2 Cal.4th at P. 663.) The court also noted that '[a]lthough the same standard is applicable for instructions by the court and comments by the prosecutor, it must be used with recognition of the differing nature and force of its two objects in the eyes of the jury. We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (Id. at p. 663, fn. 8.)

Here, we see no reasonable likelihood that the jury misconstrued the instruction or misapplied the prosecutor's words. (*People* v. *Clair, supra,* 2 Cal.4th at p. 663.)

Personal Belief in Guilt

"A prosecutor may not express a personal opinion as to guilt 'if there is substantial danger that a juror will interpret it as being based on information not in evidence.' [Citation.]" (*People* v. *Frierson* (1991) 53 Cal.3d 730, 748.) On this ground, defendant attacks several statements in the prosecutor's rebuttal argument.

Initially, the prosecutor, after explaining the purpose of rebuttal, said: "Prosecutorial ethics prevent[] prosecutors from individually saying what we think the facts of the case are or what we personally believe of the defendant's guilt or innocence. What I'm telling you is what I believe the evidence shows. So you aren't going to hear me say I this, I that. It isn't because I don't have those beliefs, it is I can't express them in this context." This was actually a response to comments by defense counsel in his closing argument concerning his beliefs about marriage, love, relationships and including the statement: "[T]he fact is he's not guilty of each of those charges." We do not read the prosecutor's comments as expressing a personal

belief in defendant's guilt based on information outside the record. Moreover, defendant made no objection at the time and his later motion for mistrial based on this and other statements does not negate the deficiency. Nor was there a specific objection to the prosecutor's final statement: "The reason the People have to prove their case beyond a reasonable doubt is to protect the innocent, not set the guilty free."

Unlike cases relied on by defendant, here the prosecutor did not intimate a pre-trial personal belief or one based on other information. (See, for example, *People* v. *Bain* (1971) 5 Cal.3d 839, 848 [district attorney expressly told jury he would not have prosecuted defendant unless he personally believed him guilty]; *People* v. *Alverson* (1964) 60 Cal.2d 803 [Prosecutor asking for acquittal of one defendant based on his personal belief in innocence reflected an improper implication of belief in co-defendant's guilt]; see also *People* v. *Green*, *supra*, 27 Cal.3d at p. 35 [challenged remark did not mislead jury into believing prosecutor's request for verdict based on his own opinion and on evidence not introduced at trial].)

III. Sufficiency of the Evidence

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People* v. *Jones* (1990) 51 Cal.3d 294, 314, citations omitted.) We review defendant's claims of insufficient evidence with these principles in mind.

Forcible Oral Copulation

Defendant first claims that his acquittal on the companion charge of forcible sodomy demonstrates that there was insufficient evidence of the requisite force

necessary for conviction of forcible oral copulation. We disagree.

First, the record does not reveal on what evidence (or lack of it) the jury based its decision to find defendant not guilty of the sodomy charge. However, our reading of the record shows that the jury could have based its decision on Marilyn's inconsistent testimony about actual penetration and defendant's testimony that sodomy was not possible because of erectile insufficiency. [15][16] And, in fact, this possibility is consistent with the jury's determination that defendant did commit oral copulation, even though he did not commit sodomy.

Defendant is correct that the force required is force "substantially different from or substantially greater than that necessary" to accomplish the act itself. (*People* v. *Bergschneider* (1989) 211 Cal.App.3d 144, 153; see also *People* v. *Quinones* (1988) 202 Cal.App.3d 1154, 1158.) Here, Marilyn testified that defendant pushed her down on the bed, so she couldn't get up, sodomized her, then "he turn me over and sat down on my chest and comes in my mouth. . . . . still struggle, but I can't move." The police officer's report indicated Marilyn said defendant "forcibly" put his penis in her mouth. We conclude this is sufficient evidence for the jury to find forcible oral copulation. "The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. [Citations.]" (In re Frederick G. (1979) 96 Cal.App.3d 353, 366.) Defendant's interpretation that his sitting on her chest was merely positional and that his entry into her mouth required her cooperation present factual questions appropriately determined by the jury. The jury was correctly instructed on the legal requirements of the offenses charged.

We are aware of our previous decisions in *People* v. *Schulz* (1992) 2 Cal.App.4th 999 and *People* v. *Senior*

[15] [There was no footnote numbered 15 in the Opinion]

[16] Defense counsel urged this approach in closing argument.

(1992) 3 Cal.App.4th 765 and their discussions of sufficient force in the child molestation context. In both cases, however, the defendants' convictions were upheld on the basis of duress. (*Schulz*, *supra*, 2 Cal.App.4th at p. 1005; *Senior*, *supra*, 3 Cal.App.4th at p. 775-776.) Also, here, Marilyn testified to a struggle; the *Senior* court specifically noted there was no evidence of a struggle in that case. (3 Cal.App.4th at p. 774.)

False Imprisonment

Defendant was also convicted of felony false imprisonment: the "unlawful violation of the personal liberty of another," effected by "violence, menace, fraud, or deceit . . . . (§§ 236, 237.) He claims any restraint or force used was only incidental to the physical conflict between the parties. Recently, in *People* v. *Hendrix* (1992) 8 Cal.App.4th 1458, 1462, the court explained: "Force is an element of both felony and misdemeanor false imprisonment. Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as 'violence' with the false imprisonment effected by such violence a felony." Here, Marilyn testified that after she returned home on June 16, she refused to apologize to defendant even though he threatened to sodomize her. She said he "suddenly hit me," "slapped me back and forth," "choke me and drag me . . . by my hair." She estimated that he dragged her 15 or 20 feet across the living room, to the bottom of the stairs, where she grabbed on to the banister and screamed. In fact, defendant admitted to forcibly trying to remove her clothes, slapping her, which he described as "stage slaps," and then dragging her by the hair, as he explained, to keep her from biting him. From this testimony, the jury could have concluded Marilyn was being restrained and forced to a location against her will with the use of force in excess of that needed to simply confine or move her. The parties' testimony that shortly thereafter defendant left Marilyn alone in the

house briefly does not negate the preceding period of time during which she was confined against her will by violence.

Spousal Battery

In order to prove the crime of spousal battery, the prosecution must prove; (1) that one spouse intentionally inflicted a bodily injury upon the other spouse, and (2) that such bodily injury resulted in a traumatic condition. (See CALJIC No. 9.35.) "Traumatic condition" is defined as "a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force." (§ 273.5, subd. (c).) Marilyn testified that her head hurt for three days after defendant dragged her across the room by her hair. Defendant claims such injury is transient, insubstantial and only incidental to the battery.

But the statute specifies that even a minor injury is the requisite traumatic condition. (§ 273.5, subd. (c).) This element of the statute was approved by the court in *People* v. *Gutierrez* (1985) 171 Cal.App.3d 944, 952.) The court explained that some other offenses require higher degrees of harm to be inflicted before the crime denounced by them is committed (felony battery or felony assault), but "the Legislature has clothed persons of the opposite sex in intimate relationships with greater protection by requiring less harm to be inflicted before the offense is committed." (*Ibid.*)[17] We think the prolonged "hurting" of Marilyn's head is sufficient injury as required by the statute.

Defendant insists that allowing such an insubstantial and incidental injury to qualify as a spousal battery will "felonize" all spousal batteries and thus will not deter the infliction of more serious injuries. (See

[17] In *Gutierrez*, the husband pushed his wife, knocked her down, banged her head on the floor, grabbed her by the neck leaving a red mark, dragged her by the hair (causing her to lose quite a bit of hair) and through glass, causing lacerations to her legs. (Id. at p. 947-948.)

People v. *Daniels* (1969) 71 Cal.2d 1119, 1132-1133, discussing forcible kidnapping statute's element of bodily harm as requiring more than trivial injury.) We disagree. The Legislature obviously intended to punish more seriously even minor injuries inflicted by a spouse or partner.

Defendant further claims he was guilty only of a simple battery. (§ 242.) But he specifically declined jury instructions on that offense, and cannot now claim reversible error. (*People* v. *Duncan* (1991) 53 Cal.3d 955, 969.) Substantial evidence supports his conviction for spousal battery.

IV. Time Bar

Defendant next contends his prosecution for forcible sodomy and forcible oral copulation was barred by the 90-day reporting requirement applicable to spousal rapes under section 262, subdivision (b). That section prohibits arrest or prosecution for spousal rape unless the violation is reported to a peace officer or district attorney within 90 days after the day of the violation.[18] Defendant argues that the statute is broad enough to cover other sex acts, but he presents no authority for this position.

Section 262, subdivision (a) provides, in pertinent part: "Rape of a person who is the spouse of a perpetrator is an act of sexual intercourse accomplished against the will of the spouse by means of force or fear . . . ." In ascertaining legislative intent, we look to the language of the statute and "accord words their usual, ordinary, and common sense meaning based on the language the Legislature used and the evident purpose for which the statute was adopted. [Citations.]" (*In re Rojas* (1979) 23 Cal.3d 152, 155; *People* v. *Catelli* (1991) 227 Cal.App.3d 1434, 1448.) The statute specifically prohibits the act of sexual intercourse. We

[18]There is no showing that defendant demurred otherwise raised this issue before trial. It first appears in his new trial motion. It is arguable that he has waived this claim.

think a common sense interpretation of this statute prohibits the act of vaginal intercourse against the will of a spouse. The dictionary definition of sexual intercourse is coitus, in turn defined as the "physical union of male and female sexual organs . . . ." (Am. Heritage Dictionary (2d Col. ed. 1991), pp. 289, 1124.)

Section 262 was added by the Legislature in 1979, and is in direct contrast to the general rape statute (§ 262), prohibiting sexual intercourse under specified conditions with "a person not the spouse of the perpetrator . . . . No such distinction exists in the statutes prohibiting nonconsensual sodomy or nonconsensual oral copulation. (See §§ 286, 288a.)

Moreover, we note that defendant was not convicted of the sodomy charge. Even if his point were arguable concerning sodomy, stretching the statute to cover oral copulation is an even more difficult task.

Defendant has presented little analysis and no authority for his statement that these statutory distinctions violate his right to equal protection. In light of the original rape statute. which prohibited nonconsensual intercourse only with a person other than a spouse, we think the Legislature had a rational basis to criminalize and subject to a reporting requirement vaginal/penile intercourse, as the commonly acknowledged sexual interaction between marital partners.

Defendant's further complaint that the trial court erred in failing to give jury instructions based on his legal positions as set forth above and in the previous section is without merit.

V. Ineffective Assistance of Counsel

"To show ineffective assistance of counsel, defendant has the burden of proving that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687-688, 693-694 [parallel citation]; *People* v. *Le-*

desma (1987) 43 Cal.3d 171, 216-218 [parallel citation].) A mere failure to object to evidence or argument seldom establishes counsel's incompetence. (*People* v. *Ghent* [1987] 43 Cal.3d [739,] 772; see also [*People* v.] *Frierson* [1979] 25 Cal.3d [142,] 158.)" (*People* v. *Frierson*, *supra*, 53 Cal.3d at p. 747.) "If the defendant fails to establish the prejudice component of the ineffectiveness claim, a reviewing court need not determine whether counsel's performance was deficient. [Citation.]" (*People* v. *Hayes*, *supra*, 52 Cal.3d at p. 608.)

Defendant complains his counsel at trial was ineffective because: (1) he failed to request a jury instruction based on certain immigration laws; and (2) he failed to call a specific witness.

Failure to request jury instruction

Defendant asserts trial counsel should have requested a jury instruction specifically setting forth the immigration statutes, which require a showing of spousal abuse or lack of fraudulent intent in order to except an alien with permanent resident status based on marriage from the two year-marriage requirement to avoid deportation. (See 8 U.S.C. §§ 1186a, subd. (c)(4)(C); 1251, subd. (a)(1)(G).) He reasons that Marilyn's fear of deportation and desire to leave the marriage gave her a motive to fabricate charges against him. But this issue was explored on cross-examination, fully informing the jury of this possibility. And in fact, her credibility was challenged in numerous ways. Moreover, the parties were divorced at the time of trial. There is no showing that Marilyn Ramos was in violation of the immigration statutes or that she was being prosecuted by immigration authorities. We see no reasonable probability of a different result if in fact the precise language of the relevant immigration statute had been before the jury as an instruction. Careful consideration of the immigration statutes by the jury might have redounded to defendant's disadvantage, as his marital intentions might be judged fraudulent and thus in violation of immigration statutes.

Failure to call Cory Snyder

According to Snyder's declaration and testimony at the hearing on defendant's new trial motion, he offered to testify to a conversation with Marilyn shortly after the incident in which she said defendant had not hurt her and he observed no marks or bruises on her. Snyder and his Filipina wife knew defendant through a business relationship; his wife apparently disappeared because she did not want to testify at the trial. Defendant's trial counsel testified that he doubted Snyder's credibility, tried to find his wife to testify (the longer conversation with Marilyn had been mainly in Tagalog), and believed sufficient evidence was already before the jury showing no visible injuries (through the victim herself and the police officer). This could be considered a satisfactory explanation. (See *People* v. *Sanders* (1990) 221 Cal.App.3d 350, 377.) More importantly, we do not believe admission of this testimony would have any reasonable probability of effecting a different outcome.

VI. Sentencing Errors

Finally, defendant claims two sentencing errors: failure to state reasons and violation of section 654. In denying probation, the trial court noted that it would be denied "because of the nature and seriousness of this crime and the circumstances under this crime. Also, it's fairly obvious the defendant is ineligible for probation because of the nature of this crime."

Because of his section 288a, subdivision (c) conviction, defendant was statutorily ineligible for probation. (§ 1203.065, subd. (a).) Thus, a statement of reasons was not required for choosing a middle state prison sentence over probation. (*People* v. *Langevin* (1984) 155 Cal.App.3d 520, 523; see also *People* v. *Hawthorne* (1991) 226 Cal.App.3d 789, 793, fn. 5.)

As to the second alleged error, the Attorney General concedes that the acts of cohabitant battery and false imprisonment were part of an indivisible transaction with a common objective and thus one of the concur-

rent terms should be stayed under section 654. (*People* v. *Williams* (1984) 157 Cal.App.3d 145, 157.) We remand for the limited purpose of staying the two-year concurrent term on count 3.

DISPOSITION

The trial court is directed to modify the judgment to reflect a stayed sentence on Count 3. As modified, the judgment is affirmed.

Wunderlich, J.

WE CONCUR:

Cottle, P.J.

Bamattre-Manoukian, J.

People v. Carroll
No. H009040

APPENDIX E:
07/06/93 Calif. Court of Appeal, Rehearing Denied

FILED
JUL 6 1993
Court of Appeal - Sixth App. Dist.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
in and for the
SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEFFAN E. CARROLL, Defendant and Appellant.	No. H009040 Superior Court No. 144496

BY THE COURT*
The appellant's petition for rehearing is denied.

JUL 6 1993

COTTLE, P.J. P.J.

* Cottle, P.J., Bamattre-Manoukian, J. and Wunderlich, J.

APPENDIX F:
09/23/93 Calif. Supreme Court, Review Denied

SUPREME COURT
FILED
SEP 23 1993
Robert Wandruff Clerk

DEPUTY

Sixth Appellate District No. H009040
S034079

IN THE SUPEME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, respondent

v.

STEFFAN E. CARROLL, Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX G:
03/21/94 US Supreme Court, Cert. Denied

03/21/94 CARROLL v. CALIFORNIA

SUPREME COURT OF THE UNITED STATES

No. 93-1150

114 S. Ct. 1297, 127 L. Ed. 2d 649, 62 U.S.L.W. 3623

March 21, 1994

CARROLL, STEFFAN E., PETITIONER
v.
CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT.

Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg.

The petition for writ of certiorari is denied.

APPENDIX H:
Statutory Provisions

Battery Related Codes.

236 False Imprisonment defined

False imprisonment is the unlawful violation of the personal liberty of another.

237 False Imprisonment punishment

False imprisonment is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not more than one year, or by both. If such false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment in the state prison.

242 Battery defined

A battery is any willful and unlawful use of force or violence upon the person of another.

243 Battery crimes

(a) A battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail not exceeding six months, or by both such fine and imprisonment.

(b) When a battery is committed against the person of a peace officer, ... [enumerated occupations and conditions] ... the battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(c) When a battery is committed against a peace officer, ... [enumerated occupations and conditions] ... and an injury is inflicted on that victim, the battery is punishable by imprisonment in the county jail for a period of not more than one year, or by a fine of not more than two thousand dollars ($2,000), or by imprisonment in the state prison for 16 months or two or three years.

(d) When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail

for a period of not more than one year or imprisonment in the state prison for two, three, or four years.

(e) When a battery is committed against a noncohabitating former spouse, fiancé, fiancée, or a person with whom the defendant currently has, or has previously had, a dating relationship, the battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail for a period of not more than one year, or by both. If probation is granted, or the execution or imposition of the sentence is suspended, it shall be a condition thereof that the defendant participate in, for no less than one year, and successfully complete, a batterer's treatment program, or if none is available, in another appropriate counseling program designated by the court; however, this provision shall not be construed as requiring a city, a county, or a city and county to provide a new program or higher level of service as contemplated by Section 6 of Article XIII B of the California Constitution.

The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence so as to display society's condemnation for these crimes of violence upon victims with whom a close relationship has been formed.

(f) As used in this section:

[...]

(5) "Serious bodily injury" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

(6) "Injury" means any physical injury which requires professional medical treatment.

[...]

(11) "Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations.

[...]

273.5 Corporal injury of spouse

a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person of the opposite sex with whom he or she is cohabiting, or any person who willfully inflicts upon any person who is the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for 2, 3 or 4 years, or in the county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000) or by both.

(b) Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section.

(c) As used in this section, "traumatic condition" means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.

(d) For the purpose of this section, a person shall be considered the father or mother of another person's child if the alleged male parent is presumed the natural father as set forth in Section 7004 of the Civil Code.

(e) In any case in which a person is convicted of violating this section and probation is granted, the court shall require supervised counseling as a condition of probation unless, considering all of the facts and the circumstances, the court finds counseling inappropriate for the defendant.

(f) If probation is granted, or the execution or imposition of a sentence is suspended, for any person convicted under subdivision (a) who previously has been convicted under subdivision (a) for an offense that occurred within seven years of the offense of the second conviction, it shall be a condition thereof that he or she be imprisoned in the county jail for not less than 96 hours and that he or she participate in for no less

than one year, and successfully complete, a batterer's treatment program, as designated by the court. However, the court, upon a showing of good cause, may find that the mandatory minimum imprisonment, or the participation in a batterer's treatment program, or both the mandatory minimum imprisonment and participation in a batterer's treatment program, as required by this subdivision, shall not be imposed and grant probation or the suspension of the execution or imposition of a sentence.

(g) If probation is granted, or the execution or imposition of a sentence is suspended, for any defendant convicted under subdivision (a) who previously has been convicted of two or more violations of subdivision (a) for offenses that occurred within seven years of the most recent conviction, it shall be a condition thereof that he or she be imprisoned in the county jail for not less than 30 days and that he or she participate in for no less than one year, and successfully complete, a batterer's treatment program as designated by the court. However, the court, upon a showing of good cause, may find that the mandatory minimum imprisonment, or the participation in a batterer's treatment program, or both the mandatory minimum imprisonment and participation in a batterer's treatment program, as required by this subdivision, shall not be imposed and grant probation or the suspension of the execution or imposition of a sentence.

Chapter 2.5. Spousal Abusers

273.8 Legislative findings

The Legislature hereby finds that spousal abusers present a clear and present danger to the mental and physical well-being of the citizens of the State of California. The Legislature further finds that the concept of vertical prosecution, in which a specially trained deputy district attorney or prosecution unit is assigned to a case after from its filing to its completion, is a proven way of demonstrably increasing the likelihood of convicting spousal abusers and ensuring appropriate sentences for those offenders. In enacting

this chapter, the Legislature intends to support increased efforts by district attorneys' offices to prosecute spousal abusers through organizational and operational techniques that have already proven their effectiveness in selected cities and counties in this and other states.

273.81 Spousal abuser prosecution program

(a) There is hereby established in the Office of Criminal Justice Planning a program of financial and technical assistance for district attorneys' offices, designated the Spousal Abuser Prosecution Program. All funds appropriated to the Office of Criminal Justice Planning for the purposes of this chapter shall be administered and disbursed by the executive director of that office, and shall to the greatest extent feasible, be coordinated or consolidated with any federal or local funds that may be made available for these purposes.

The Office of Criminal Justice Planning shall establish guidelines for the provision of grant awards to proposed and existing programs prior to the allocation of funds under this chapter. These guidelines shall contain the criteria for the selection of agencies to receive funding and the terms and conditions upon which the Office of Criminal Justice Planning is prepared to offer grants pursuant to statutory authority. The guidelines shall not constitute rules, regulations, orders, or standards of general application.

(b) The executive director is authorized to allocate and award funds to counties in which spousal abuser prosecution units are established or are proposed to be established in substantial compliance with the policies and criteria set forth in this chapter.

(c) The allocation and award of funds shall be made upon application executed by the county's district attorney or by the city's attorney and approved by the county board of supervisors or by the city council. Funds disbursed under this chapter shall not supplant local funds that would, in the absence of the California Spousal Abuser Prosecution Program, be made available to support the prosecution of spousal

abuser felony cases. Local grant awards made under this program shall not be subject to review as specified in Section 10295 of the Public Contract Code.

(d) Local government recipients shall provide 20 percent matching funds for every grant awarded under this program.

273.82 Enhanced prosecution efforts

Spousal abuser prosecution units receiving funds under this chapter shall concentrate enhanced prosecution efforts and resources upon individuals identified under selection criteria set forth in Section 273.83. Enhanced prosecution efforts and resources shall include, but not be limited to, all of the following:

(a) (1) Vertical prosecutorial representation, whereby the prosecutor who, or prosecution unit which, makes the initial filing or appearance in a case performs all subsequent court appearances on that particular case through its conclusion, including the sentencing phase.

(2) Vertical counselor representation, whereby a trained domestic violence counselor maintains liaison from initial court appearances through the case's conclusion, including the sentencing phase.

(b) The assignment of highly qualified investigators and prosecutors to spousal abuser cases. "Highly qualified" for the purposes of this chapter means: (1) individuals with one year of experience in the investigation and prosecution of felonies, (2) individuals whom the district attorney has selected to receive training as set forth in Section 13836, or (3) individuals who have attended a program providing equivalent training as approved by the Office of Criminal Justice Planning.

(c) A significant reduction of caseloads for investigators and prosecutors assigned to spousal abuser cases.

(d) Coordination with local rape victim counseling centers, spousal abuse services programs, and victim-witness assistance programs. That coordination shall include, but not be limited to: referrals of individuals

to receive client services; participation in local training programs; membership and participation in local task forces established to improve communication between criminal justice system agencies and community service agencies; and cooperating with individuals serving as liaison representatives of local rape victim counseling centers, spousal abuse victim programs, and victim-witness assistance programs.

273.83 Individuals subject to special prosecution

(a) An individual shall be the subject of a spousal abuser prosecution effort who is under arrest for any act or omission described in subdivisions (a) and (b) of Section 13700.

(b) In applying the spousal abuser selection criteria set forth in subdivision (a), a district attorney shall not reject cases for filing exclusively on the basis that there is a family or personal relationship between the victim and the alleged offender.

(c) In exercising the prosecutorial discretion granted by Section 273.85, the district attorney shall consider the number and seriousness of the offenses currently charged against the defendant.

273.84 Policies

Subject to the provisions of Chapter 2.6 (commencing with Section 1000.6) of Title 6 of Part 2, each district attorney's office establishing a spousal abuser prosecution unit and receiving state support under this chapter shall adopt and pursue the following policies for spousal abuser cases:

(a) All reasonable prosecutorial efforts shall be made to resist the pretrial release of a charged defendant meeting spousal abuser selection criteria.

(b) All reasonable prosecutorial efforts shall be made to persuade the court to impose the most severe authorized sentence upon a person convicted after prosecution as a spousal abuser. In the prosecution of an intrafamily sexual abuse case, discretion may be exercised as to the type and nature of sentence recommended to the court.

(c) All reasonable prosecutorial efforts shall be made to reduce the time between arrest and disposition of charge against an individual meeting spousal abuser criteria.

273.85 Quarterly submission of information

(a) The selection criteria set forth in Section 273.84 shall be adhered to for each spousal abuser case unless, in the reasonable exercise of prosecutor's discretion, extraordinary circumstances require departure from those policies in order to promote the general purposes and intent of this chapter.

(b) Each district attorney's office establishing a spousal abuser prosecution unit and receiving state support under this chapter shall submit the following information, on a quarterly basis, to the Office of Criminal Justice Planning:

(1) The number of spousal abuser cases referred to the district attorney's or city attorney's office for possible filing.

(2) The number of spousal abuser cases filed for felony prosecution.

(3) The number of spousal abuser cases taken to trial.

(4) The number of spousal abuser cases tried which resulted in conviction.

273.86 Characterization of defendant as spousal abuser

The characterization of a defendant as a "spousal abuser" as defined by this chapter shall not be communicated to the trier of fact.

273.87 Use of federal funds

The Office of Criminal Justice Planning is encouraged to utilize Federal Victims of Crimes Act (VOCA) funds or any other federal funds that may become available in order to implement this chapter.

13700 Definition of Abuse

As used in this title:

(a) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing an-

other person in reasonable apprehension of imminent serious bodily injury to himself, or another.

(b) "Domestic violence" is abuse committed against an adult or fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or has or has had a dating or engagement relationship.

(c) "Officer" means any law enforcement officer employed by a local police department or sheriff's office, consistent with Section 830.1.

(d) "Victim" means a person who is a victim of domestic violence.

Sex Crime Related Codes.

261 Rape

Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. ...

(2) Where it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another.

(3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, administered by or with the privity of the accused.

(4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused.

(5) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute

the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

261.6 Consent defined

In prosecutions under Section 261, 286, 288a, or 289, in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

262 Rape of spouse

(a) Rape of a person who is the spouse of a perpetrator is an act of sexual intercourse accomplished against the will of the spouse by means of force or fear of immediate and unlawful bodily injury on the spouse or another, or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this subdivision, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(b) The provisions of Section 800 shall apply to this section; however, there shall be no arrest or prosecution under this section unless the violation of this section is reported to a peace officer having the power to arrest for a violation of this section or to the district

attorney of the county in which the violation occurred, within 90 days after the day of the violation.

263 Essential guilt of rape

The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime.

264 Rape punishments

(a) Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. Rape, as defined in Section 262, is punishable either by imprisonment in the county jail for not more than one year or in the state prison for three, six, or eight years. ...

281 Bigamy defined

(a) Every person having a husband or wife living, who marries any other person, except in the cases specified in Section 282, is guilty of bigamy.

(b) Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the marriages may be proved by evidence which is admissible to prove a marriage in other cases; and when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge.

283 Bigamy punishment

Bigamy is punishable by a fine not exceeding ten thousand dollars ($10,000) or by imprisonment in a county jail not exceeding one year or in the state prison.

286 Sodomy

(a) Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person.

(b) (1) Except as provided in Section 288, any person who participates in an act of sodomy with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for not more than one year.

(2) Except as provided in Section 288, any person over the age of 21 years who participates in an act of sodomy with another person who is under 16 years of age shall be guilty of a felony.

(c) Any person who participates in an act of sodomy with another person who is under 14 years of age and more than 10 years younger than he or she, or when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat shall be punished by imprisonment in the state prison for three, six, or eight years.

[...]

(k) Any person who commits an act of sodomy, where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official, shall be punished by imprisonment in the state prison for three, six, or eight years.

As used in this subdivision, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(l) As used in subdivisions (c) and (d), "threatening to retaliate" means a threat to kidnap or falsely imprison, or inflict extreme pain, serious bodily injury, or death.

287 Sodomy; sufficiency of penetration

Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.

288a Oral copulation

(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person.

(b) (1) Except as provided in Section 288, any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(2) Except as provided in Section 288, any person over the age of 21 years who participates in an act of oral copulation with another person who is under 16 years of age is guilty of a felony.

(c) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she, or when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat shall be punished by imprisonment in the state prison for three, six, or eight years.

[...]

(k) Any person who commits an act of oral copulation, where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.

As used in this subdivision, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(l) As used in subdivisions (c) and (d), "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death. ...

1203.065 Mandatory sentence for certain sex offenses

(a) Notwithstanding any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is convicted of violating subdivision (2) of Section 261, Section 264.1, or Section 266h, or Section 266i, or Section 266j, subdivision (a) of Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, or subdivision (c) of Section 311.4. ...

The End